Supreme Court, U. S.
FILED
OCT 13 1978
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN and
PHILLIP BRINKMAN,
By Their Mother and Next Friend, Donna
Brinkman, et al.,

(Additional Respondents Inside Cover)

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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by their Mother and Next Friend, Arva Montague;

Debbora Mitchell,
by her Father and Next Friend, John Mitchell;

Robbin J. Kent, Michael J. Kent and Leslie A. Kent,
by their Father and Next Friend Henry K. Kent;

Claudius R. Walker, Frserieea M. Walker and Bernice L.
Walker, by their Father and Next Friend, C. R. Walker, Jr.;

Rubin Atitia Jackson and Lahmarie Jackson,
by their Mother and Next Friend, Winona Jackson;

National Association for the Advancement of Colored People;

John J. Gilligan, Governor of the State of Ohio, etc.;

William J. Brown,
Attorney General of the State of Ohio;

Ohio State Board of Education;

Martin W. Essex, Superintendent of Public Instruction,
Ohio Department of Education;

Terry Lawson;

Leo A. Lucas;

Jane Sterzer;

Wayne M. Carle,
Superintendent of Dayton School District.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners Dayton Board of Education; an individual Board member, William E. Goodwin; and two former Board members, Josephine Groff and James D. Hart, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on July 27, 1978.

I. OPINIONS BELOW

The opinion of the Court of Appeals, entered on July 27, 1978 and not yet reported (*Dayton IV*), appears in the appendix to this petition (App. 189a) as does the unreported opinion of the District Court which was entered on December 15, 1977 (App. 142a).

The June 27, 1977 opinion of this Court remanding the action to the District Court is reported at 433 U.S. 406 (1977) (*Dayton*). The three previous opinions of the Sixth Circuit in *Brinkman* v. *Gilligan* are reported at 539 F.2d 1084 (1976) (*Dayton III*), *vacated and remanded sub nom., Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977); 518 F.2d 853 (1975) (*Dayton II*); and 503 F.2d 684 (1974) (*Dayton I*).

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED

A. In A School Desegregation Case Is A Finding Of A Systemwide Violation Justified By The Application Of Judicially Created Presumptions Of Systemwide And Continuing Intent And Effect To Proof Of Isolated Segregative Practices That Had Been Eliminated From The School System Long Before Suit Was Filed?

B. Is The Effect Of Board Actions, Viewed Under A Natural And Foreseeable Result Test, Sufficient To Establish Segregative Intent In A School Desegregation Case?

C. Once Constitutional Violations Have Been Established In A School Desegregation Case, Is The Imposition Of A Systemwide Racial Balance Plan Justified In The Absence Of Proof That Such A Plan Reasonably Approximates The Racial Distribution Of School Population That Would Have Occurred In The Absence Of Such Violations?

D. Is The Imposition Of Any Remedy In A School Desegregation Case Justified In The Absence Of Proof That Any Of The Plaintiffs Bringing The Action Had Been Injured Or That The Action Is Maintainable As A Class Action?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fourteenth Amendment To the United States Constitution, Section 1:

". . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the law."

B. United States Code, Title 28:

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress

providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

C. United States Code, Title 42:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

D. Ohio Revised Code, Chapter 33:

§ 3313.48 Free Education To Be Provided; Minimum School Year.

The Board of Education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will

be most convenient for the attendance of the largest number thereof.

V. STATEMENT OF THE CASE

The history of this litigation during the period from its inception on April 17, 1972 until the decision rendered by this Court on June 27, 1977 is set forth in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 97 S.Ct. 2766 (1977) (*Dayton*). On remand, pursuant to this Court's directive, the District Court conducted evidentiary hearings which commenced on November 1, 1977. Considering all of the evidence presented at the various trials and hearings of this action in the light of the principles established by this Court, the District Court concluded that the plaintiffs had failed to establish a right to relief. On December 15, 1977 it accordingly entered an order dismissing the plaintiff's complaint (App. 188a).

The District Court based its order on a detailed series of findings of fact and conclusions of law (App. 142-188a). In considering historical isolated incidents of constitutional violations it found that there was no proof of any incremental segregative effect from such actions (App. 147-149a). Existing racial imbalance was not found to be a result of any intentional segregative act or acts on the part of the Dayton Board, but rather the simple reflection of residential living patterns in the geographic area served by the school system (App. 149-150a).

Faculty assignment and hiring practices were reviewed. While such practices involved purposeful separation of teachers by race until 1951, all vestiges of these earlier practices had disappeared by 1969 – some three years before this litigation was instituted (App. 153a). Moreover, these earlier practices were specifically found not to have had any incremental segregative effect (App. 154a). The Trial Court, on the basis of the evidence, found that racial identifiability of

schools was determined by their student composition and not by faculty assignment (App. 153-154a).

Attendance zones were held not to have been created with any discriminatory intent (App. 155a). Transfer policies were found to be non-discriminatory with the exception of a practice of transfers involving Shawen Acres Orphanage students – a practice which ceased in the early 1950's and which was held not to have had any incremental segregative effect (App. 158-159a). Site selection, construction, uses of portables and school utilization practices were found not to have involved any intent to discriminate and not to have had any incremental segregative effect (App. 173-180a).

Although Dunbar High School was established as a voluntary black school in 1933, the census data established that Dunbar would have been all black by 1960 even if it had not been a school for voluntary attendance (App. 169-171a). Establishment of the old Dunbar High School was accordingly held not to have had any incremental effect on the situation existing in the school system when suit was filed in 1972. The Trial Court further found that there was no segregative intent with respect to the creation of the new Dunbar High School in 1962 (App. 171a).

The one adverse finding made in the previous decision of the District Court – the maintenance of optional attendance zones between contiguous schools throughout the district – was reexamined in the light of additional evidence presented at the hearings following the remand. The evidence demonstrated neither segregative intent nor segregative effect in the establishment and maintenance of optional zones (App. 162-169a).

As was confessed by one of the experts called by the plaintiffs at the post-remand hearings, the Dayton Board had really done nothing to separate the races for at least two decades before this case came to trial (TR. 2: 1027). As an official of the plaintiff NAACP admitted, the worst thing that can

be said in retrospect about the Dayton schools is that they reflect the racial imbalance of the geographic neighborhoods they serve (TR. 2: 1036-1042a).

After the dismissal of their complaint, the plaintiffs filed a notice of appeal to the Sixth Circuit Court of Appeals. On January 16, 1978 the Sixth Circuit issued a stay order holding in effect pending appeal the systemwide racial balance plan which had been imposed prior to this Court's decision in *Dayton*. On June 27, 1978 the Sixth Circuit reversed the District Court's dismissal of the case, and it entered a final order reinstating the systemwide racial balance plan (App. 217a). Applications for a stay were denied, and students in the Dayton system are still being transported to distant school buildings under a plan that cannot stand under the facts presented and the constitutional principles applicable to those facts.

VI. REASONS FOR GRANTING THE WRIT

In its prior opinion this Court expressed the view that, while this case raises issues important to the law of desegregation, it "is every bit as important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 2770 (1977). That statement was not only accurate; it was prophetic. Indeed, it is necessary to broaden the statement at this point to encompass the allocation of functions between the Supreme Court and the courts of appeals as well as between the courts of appeals and the district courts.

Having been reversed by this Court, the Sixth Circuit proceeded at its first opportunity to ignore and distort the constitutional principles which have been carefully delineated by this Court and to construct a whole new jurisprudence of desegregation. If each of the circuits in our federal system

is free to rewrite the law applicable to desegregation cases according to its own independent concept of what that law should be, there is no reason for this Court to grant a writ of certiorari. If inferior federal courts lack the right to secede from the federal judicial system, however, then a writ of certiorari must be granted in order to permit this Court to eradicate the doctrinal aberrations that have been devised by the Sixth Circuit with the aim of achieving a desired result of systemwide racial balance without regard to the facts determined by the District Court or to the law determined by this Court.

A. The Sixth Circuit's Adoption Of Legal Presumptions Of Systemwide And Continuing Segregative Intent And Effect From Isolated Practices That Existed Before Brown I And That Had Been Eliminated Long Before Initiation Of This Desegregation Action Is In Conflict With Keyes.

The efforts of the Sixth Circuit to rewrite the law of desegregation in this action have already elicited the following comments from one Justice of this Court:

> ". . . The Sixth Circuit has misinterpreted the mandate of this Court's *Dayton* opinion."
>
> ". . . The Sixth Circuit . . . evidenced an unduly grudging application of *Dayton*."
>
> "The Sixth Circuit is apparently of the opinion the presumptions in combination with such isolated violations, can be used to justify a systemwide remedy where such a remedy would not be warranted by the incremental segregative effect of the identified violations. That is certainly not my reading of *Dayton* and appears inconsistent with this Court's decision to vacate and remand the Sixth Circuit's opinion in *Dayton III*."

Columbus Board of Education v. *Penick*, No. A-124 (S.Ct.

filed August 11, 1978, J. Rehnquist, on application for stay). Since the author of these words was also the author of this Court's opinion in *Dayton*, his interpretation of that opinion should be accorded considerable weight. An analysis of the ways in which the Sixth Circuit has distorted and displaced prior applicable decisions of this Court should justify Mr. Justice Rehnquist's prediction that at least four justices would vote to grant certiorari in this action.

1. The Sixth Circuit Adopted An Erroneous Standard Of Assessing Evidence In Desegregation Cases When It Attached A Pivotal And Determinative Significance To Conditions In 1954.

At the core of the Sixth Circuit's decision is an adoption of what might be called the "poison in the well" theory. If there were any segregative practices extant in a school system in 1954 when this Court's historic decision in *Brown* v. *Board of Education* was rendered, an affirmative duty arose on the part of the school board to achieve a racial balance of students throughout the system. Judicially created presumptions of systemwide and continuing intent and effect may then be applied to place upon the board a burden of proof that can only be satisfied by a showing that it had achieved a racial balance of students throughout the system at the time suit was filed. If such a balance has not been achieved by board action, the only way of removing the poison from the well is by imposing such a balance by a federal court decree.

This novel approach was first suggested in the amicus brief filed by the Department of Justice in *Dayton*, and it was picked up by the plaintiffs in the oral arguments presented in that case. It was tacitly rejected by this Court in *Dayton*, and it represents a complete inversion of prior decisions of this Court. In order to establish *de jure* segregation, the plaintiffs in this case or any other case are required to prove a current condition of segregation resulting from intentional

state action. *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 205 (1973). Historical background is relevant only to the extent it sheds light on the question whether a current condition of state-imposed segregation exists. *Ibid.*

The cart-before-the-horse approach of the Sixth Circuit is in direct conflict with this Court's opinion in *Keyes.* Whether suit is filed in 1964, 1974 or 2054, the focus of judicial attention should be on the conditions existing at the time of suit rather than ten, twenty or one hundred years earlier. By shifting the focus from present to past and with the aid of unsupported presumptions that pre-*Brown I* acts affected the entire system, the Sixth Circuit concluded that the Dayton Board was operating a dual system in 1954 and was under a duty to desegregate its schools for the following twenty-four years (App. 194a, 205a, 213a). This conclusion was further exacerbated by the reviewing court's imposition on the defendant board of the burden of proving the negative propositions not only that all of its post-1954 acts were free of segregative intent, but also that the racial imbalance existing when suit was filed in April of 1972 was not caused by unlawful segregative design (App. 205-206a).

It is tempting to engage in a quarrel over the Sixth Circuit's analysis of the pre-1954 evidence. For example, it is difficult to square the label "dual system" with a situation which involved in 1954 some fifty per cent of black students attending racially mixed rather than all black schools (See Deft's Exhibit AU). It is the doctrinal aberration created by the Sixth Circuit, however, which compels the attention of this Court and justifies the granting of a writ of certiorari in this case. The rule of *Keyes* should not be subverted, and historical background should not be transmogrified into a determinative focus in order to produce a desired result through artificial presumptions and shifting burdens.

2. The Sixth Circuit Adopted An Erroneous Standard Of Assessing Evidence In Desegregation Cases When It Applied Artificial Presumptions Of Intent And Effect To Impose An Impossible Burden Of Proof On The School Board In The Absence Of A Showing That At The Time Of Suit There Was Purposeful State-Imposed Segregation In A Substantial Portion Of The School System.

Having abandoned the doctrinal focus on a current condition of state-imposed segregation in favor of its "poison in the 1954 well" theory, the Sixth Circuit proceeded to make two other fundamental errors which serve to make a decision in favor of a school board impossible in this or any other case. These errors will be analyzed in detail in succeeding sections of this petition. They require mention here because of the role they play in creating the artificial presumptions and reversed burdens which are the props on which rest the Sixth Circuit's findings on liability.

First, the Court rendered "effect" synonymous with "intent" insofar as determining the presence of constitutional violations is concerned. Next, it expressed the view that the Dayton Board in 1954 had an affirmative duty not simply to remedy the effects of past segregative practices, but "to diffuse black and white students throughout the Dayton school system" (App. 212a).

If segregative practices in 1954 impose an affirmative duty to diffuse black and white students throughout a school system, then it is obvious that anything less than such a diffusion can only be the result of a breach of that duty. If "effect" is synonymous with "intent," then such a breach must be considered intentional. Since the duty to diffuse applies to the entire system, every act or omission is presumed to have a systemwide effect. The school system is perceived

as a seamless web which vibrates in all its reaches whenever any part is touched. Thus, the fact that there were four all black schools in 1954 is presumed to have a segregative effect on all schools in the system.

The fact that black and white students were not diffused throughout the system creates a presumption of continuing effect. Since "the relevant inquiry is whether at the time of *Brown I*, or any time thereafter, defendants were operating a dual school system" as defined by the Sixth Circuit, a finding of segregative practices with effects that lingered in 1954 shifts the burden of proof to the School Board regardless of what the situation may have been eighteen years later when suit was filed. (*See* App. 202-205a). The burden becomes one of demonstrating diffusion. It cannot be satisfied in this or in any other desegregation case because the demographics of population distribution will simply not produce such a diffusion.

The judicial manipulation of isolated and long-abandoned segregative practices into a conclusion of a current systemwide constitutional violation defies common sense and conflicts with the controlling decisions of this Court. A presumption may be defined as an inference as to the truth of a proposition based on probable reasoning in the absence of actual proof or disproof. It serves no other purpose in the determination of litigation, and if it is not based on probable reasoning it does not deserve to be adopted as a presumption.

To conclude, as does the Sixth Circuit, that intent and effect are synonymous does not accord with probable reasoning; the surgeon does not intend to kill the patient who dies while undergoing the operation that carries a risk of mortality. To conclude, as does the Sixth Circuit, that every isolated segregative act has a systemwide and continuing effect does not accord with probable reasoning; much of the historical evidence in this case was buried beyond the reach of memory until dredged up by the plaintiffs for forensic purposes. To

conclude, as does the Sixth Circuit, that in the absence of constitutional violations black and white students would be diffused throughout the Dayton school system does not accord with probable reasoning; indeed, the record contains evidence indicating that the distribution of students that existed in the system when suit was filed would have been the same even if every action of the Board in the last seventy-eight years had been racially neutral by 1978 standards.

The "presumptions" employed by the Sixth Circuit are not "presumptions" in the legal sense of that term; they are simply artificial tools employed to rationalize a desired result. Unless this Court accepts jurisdiction, a precedent will have been established which not only conflicts with the leading desegregation decisions issued by this Court, but also requires with scant regard for evidence a finding of constitutional violations in any school desegregation case that could conceivably be filed anywhere in this country.

B. The Use Of A Natural And Foreseeable Result Test To Determine Segregative Intent Conflicts With Washington v. Davis, Arlington Heights And Dayton.

The Sixth Circuit's decision in this case is not only in direct conflict with this Court's decision in *Keyes;* it is also in direct conflict with this Court's decisions in *Washington* v. *Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

In remanding *Dayton* this Court specifically directed the District Court to make new findings in light of the discriminatory intent requirements set forth in those decisions. 433 U.S. at —, App. at 136-137a. In compliance with this remand order, the District Court made a detailed analysis of intent as it related to the various Board policies and practices (App. 142-

186a). The Sixth Circuit rejected these findings and instead premised its findings of segregative intent upon a presumption of segregative purpose arising from a natural, probable and foreseeable result test (App. 203-204a, 213a).

Common sense dictates the rejection of such an approach to resolving a question of segregative intent. The approach reflects the "Alice in Wonderland" logic that "justifies" the plaintiffs' argument that since it is foreseeable that whites will leave a school system unless they have no means of escaping a racially mixed school situation, any act of a school board less than achieving racial balance throughout the entire system is an intentional act of segregation. Building a school in a black area is an intentional segregative act since the school will serve a predominately black population; building a school in a white area is an intentional segregative act since the school will serve a predominately white population; building a school in a racially mixed area is an intentional segregative act since the existence of such a mix will encourage whites to leave the area. Under the plaintiffs' and the Sixth Circuit's view, any act on the part of the Board that falls short of systemwide racial balance is by definition an intentional segregative act. Common sense demurs.

The decisions of this Court in *Washington* v. *Davis* and *Village of Arlington Heights* likewise reject the "effect" test which the Sixth Circuit has attempted to engraft upon the law in this area. In *Washington* v. *Davis* the primary controlling issue in cases of this nature was defined as "purpose or intent to segregate"; "intent" was equated with "state contrivance to segregate" and "a purposeful device to discriminate." 426 U.S. at 240, 246. In *Arlington Heights* this Court elaborated upon its prior decisions by expressly setting forth guidelines for the determination of the crucial issue of intent to segregate. Conspicuously absent was any reference to a natural, probable and foreseeable result test. 429 U.S. at —, 97 S.Ct. at 564. Finally, the foreseeability test utilized by the Sixth Circuit in this action is in direct conflict with

this Court's implicit rejection of such a test in *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976).

It is impossible to square the Sixth Circuit's decision in *Dayton IV* with these decisions. This Court should not sit idly by while an inferior appellate court proceeds blandly to rewrite an entire body of law and to overrule from below applicable decisions of this Court in order to secure what is deemed a socially desirable result.

C. The Imposition Of A Systemwide Racial Balance Plan In The Absence Of Proof That Such A Plan Reasonably Approximates The Racial Distribution Of Student Population That Would Have Occurred In The Absence Of A Constitutional Violation Is Contrary To The Holdings Announced In Dayton.

While the Sixth Circuit's handling of the issue of constitutional violations in this case is marked by clear-cut conflicts with and novel departures from prior decisions of this Court, its handling of the issues of causation and remedy presents an even more striking conflict with the precise mandate of this Court in its prior consideration of this litigation. The mandate in *Dayton* was concise and unambiguous:

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy."

433 U.S. at —, 97 S.Ct. at 2775. The Sixth Circuit proceeded

past what can only be considered a complete misreading of the term "incremental segregative effect" to reach a totally different concept of remedy.

1. The Sixth Circuit Misconstrued The Requirement Of Establishing Incremental Segregative Effect In Desegregation Cases And Misplaced The Burden Of Proof On That Issue.

In addressing the subject of remedy the Sixth Circuit quotes the very passage we have just quoted from *Dayton*, and then proceeds to redefine "incremental" in terms of its seamless web presumption of systemwide and continuing effects instead of in terms of the increment or difference between the racial separation that would have occurred in the absence of constitutional violations and the racial separation that has occurred in the presence of such violations.

> "The word 'incremental' merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is 'incremental' in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state Constitution."

(App. 214-215a).

This Court described a result; the Sixth Circuit describes a process. If the Sixth Circuit has correctly stated the meaning this Court intended to convey by the words "incremental segregative effect," those words – which seemed so clear when issued in 1977 – contained hidden ambiguities that require a gloss in 1978. If the Sixth Circuit has misconstrued this Court's meaning, that misconstruction must be corrected before it serves further to distort the law in this area.

The Sixth Circuit's conception of "incremental effect" as describing a process rather than a result was a natural offshoot of the artificial presumptions it employed in considering the violation side of the case. Indeed, its discussion of the alleged error of the District Court in allocating the burden of proof on the issue of incremental segregative effect to the plaintiffs works a fusion between the violation stage and the remedy stage of the case. *See* App. 216a. It reasserts its view that once segregative practices are found to have existed in 1954 there is a "presumption that the current racial composition of the school population reflects the systemwide impact of those violations" (App. 216a). The obvious corollary to this presumption is a presumption that but for a systemwide impact of violations there would have been a homogenous distribution of black and white students throughout the system.

Leaving aside the problem that these are artifical concepts created to justify an end rather than logical inferences based on reasonable probability, we can see that the Sixth Circuit's approach cuts across both issues of remedy and violation. If the defendant is required to rebut the systemwide impact presumption, he should also be required to rebut the corollary presumption that without such systemwide impact the distribution of black and white students would have been uniform throughout the system.

Once again the Sixth Circuit has carried the law of desegregation through the looking glass. The issues of violation and of remedy are to be given separate consideration under the mandate of this Court. Just as a plaintiff in a tort case must in the first instance carry the burden of establishing both negligence and causation, the plaintiff in a case of this nature must in the first instance carry the burden of establishing both constitutional violations and the incremental segregative effect of those violations. The burden-shifting principles established in *Keyes* do not extend to the remedy stage of the case, and the language of this Court in *Dayton* certainly phrases the burden of establishing incremental segregative effect as a plaintiff's burden.

Once the question of incremental segregative effect has been reached, a constitutional violation has of necessity been found to exist. If this Court intended to place the burden of proof on the defendant instead of on the plaintiff, it would have phrased the task in terms of demonstrating that the racial distribution of the school population would not have been significantly different in the absence of the violation. Instead, the task was phrased in the positive terms of showing the incremental segregative effect of the violations on the racial distribution of the school population as presently constituted. Thus, while this Court did not specifically address the placing of the burden of proof in *Dayton* beyond saying that "[i]t is for the finder of fact to make the complex factual determinations in the first instance," its phrasing of the nature of the task is in terms of an affirmative plaintiff's burden rather than a negative defendant's burden. This placement of the burden of proof is likewise in accord with the traditional principles governing non-desegregation cases.

2. The Sixth Circuit Adopted An Erroneous Remedial Standard Which Imposes Upon A School Board An Affirmative Duty To Diffuse Black And White Students Throughout The School System Without Regard To The Distribution Of Students That Would Have Taken Place In The Absence Of Constitutional Violations.

In its rush to place what it deems sociological desirable ends ahead of constitutional means, the Sixth Circuit did little more than shove aside the questions of proximate cause implicit in this Court's analysis of the issue of incremental segregative effect. In its entanglement with result-oriented presumptions, it also ignored the plain implications of that issue for remedy determination. Once constitutional violations with a lingering

effect in 1954 are found – and in view of the seamless web theory of systemwide and continuing effects, almost any pre-1954 violation will produce such a finding – nothing short of a systemwide racial balance plan will suffice as a remedy.

What happened to the careful weighing of the difference between what is and what would have been and the "complex factual determinations" contemplated by this Court in *Dayton*? They simply disappear in the Sixth Circuit's presumption that present racial imbalance is a reflection of the systemwide impact of constitutional violations. In the Sixth Circuit's view any school system which is free from the taint of segregative acts would reflect a racial balance of students uniformly throughout its schools. Perhaps the most telling phrase in the entire opinion of the Sixth Circuit is its indication that the existence of the effects of past segregative practices in 1954 gives rise to "an affirmative duty" on the part of the School Board "to diffuse black and white students throughout the . . . school system" (App. 212a). If such is the duty, it can hardly be satisfied by anything less than such a diffusion, and the only appropriate remedy is the achievement of approximate racial balance of students through mandatory busing.

Such, however, is not the duty as defined by *Dayton* and prior decisions of this Court. The imposition of a systemwide racial balance plan in the absence of any evidence to suggest that the Dayton system would have been integrated to such an extent if no constitutional violations had ever occurred is in direct opposition to the reasoning expressed in *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976). As stated in *Austin*, which was cited with approval in *Dayton*, there must be evidence "in the record available to us to suggest that absent those constitutional violations the . . . school system would have been integrated to the extent contemplated by the plan." *Ibid.*

In this case no such evidence exists. The Trial Court held that the preponderance of the evidence did not establish that

any of the actions of the Dayton Board had any incremental segregative effect. This holding was supported by the uncontroverted demographic and historical evidence that the racial composition of the Dayton schools has been consistent with the residential pattern of the school district and that the optional attendance zones which were created by the Board had no incremental segregative effect.

In the face of this evidence and in spite of the guidelines carefully delineated by this Court in *Dayton*, the Sixth Circuit simply presumed that but for constitutional violations the Dayton system would have been racially balanced. In accordance with this irrational presumption, it simply reinstated the systemwide, racial balance plan (App. 217a). It thus added another error to the conflicts between its reasoning and the constitutional principles established by the controlling decisions of this Court.

D. Imposition Of A Remedy Where There Is A Failure To Prove Standing Is Contrary To Established Judicial Precedent.

At every stage of this litigation from the time it was filed in April of 1972, the Dayton Board has asserted its denial that the plaintiffs have any standing to sue. This issue was raised in *Dayton*. Presumably, the remand for the taking of additional evidence was intended to give the plaintiffs another opportunity to rectify this defect. As in the prior evidentiary hearings, however, no plaintiff testified at the remand hearing and there was no evidence introduced at that hearing to establish that any plaintiff or any member of the class which he or she reportedly represented was excluded from any school in the Dayton system on account of race. This hiatus in the proof is fatal. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

There is no evidence anywhere in the records of this action that any of the plaintiffs sustained any injury or that any of them was deprived of any constitutional right. In the absence of any such evidence, the plaintiffs have no standing, and they cannot prevail in this action. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *O'Shea* v. *Littleton*, 414 U.S. 488, 493-94 (1974).

The propriety of this action under Rule 23 of the Federal Rules of Civil Procedure is dependent upon proof by the individual plaintiffs that they are members of the class they purportedly represent. *Bailey* v. *Patterson*, 369 U.S. 31 (1962). It is also dependent upon certification by the district court of this suit as a class action. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976). Neither of these requirements was met.

The record in this case is completely devoid of any testimony whatsoever that any of the plaintiffs were children or parents of children who are or were or would be attending any school within the Dayton school system or that any of them resided within the geographic boundaries of the Dayton system. There is no evidence that any of the plaintiffs are members of the class that was allegedly, directly or indirectly, excluded from any school because of their race. In the absence of such proof, this action cannot be maintained as a class action. *Davis* v. *Schultz*, 453 F.2d 497 (3rd Cir. 1971); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

In addition to the failure of the plaintiffs to establish that any of them was a member of a class he or she purportedly represented, there was no determination by the District Court that this action was maintainable as a class action. This failure, in and of itself, defeats the right of the plaintiffs to maintain the action as a class action.

VII. CONCLUSION

Something is obviously wrong when two courts, purporting to follow the same specific guidelines, reach diametrically opposed results. The Sixth Circuit, in reversing the District Court's outright dismissal of the plaintiffs' complaint, says that the District Court "misunderstood" this Court's mandate. Mr. Justice Rehnquist, in examining the Sixth Circuit's reinstatement of a mandatory racial balance busing plan affecting every school and every student in the system, suggests that the misunderstanding came at the appellate level. It is clear that someone has misconstrued the principles which this Court has attempted to establish. We respectfully submit that it is equally clear that a failure of this Court to resolve the resulting confusion will lead to further doctrinal aberrations in an area of law that directly affects the daily lives of a large percentage of the population of this country.

An analysis of the Sixth Circuit's opinion in this case reveals it as little more than a compendium of conflicts with the controlling decisions of this Court in *Dayton, Arlington Heights, Washington* v. *Davis, Austin* and *Keyes*. The District Court, pursuant to the plain mandate placed before it, first attempted to determine whether there is in the Dayton school system a current condition of racial separation caused by intentional segregative acts of the Dayton Board. It then proceeded to determine how much incremental segregative effect, if any, was caused by such acts, as compared with the conditions of racial separation that would have occurred in the absence of those acts. The factual determinations may have been complex, but they were honestly and objectively made and thoroughly grounded with supporting references to the record.

The Sixth Circuit rejected this approach and analysis. Instead of focusing on current conditions, it focused on 1954 and concluded as a matter of doctrine that if the school system reflected any effect of segregative practices at that time,

the School Board had from that time forward an affirmative duty to diffuse black and white students throughout the system. The only way of discharging that duty would be to demonstrate that a systemwide racial balance of students exists; the obvious remedy for anything less than such a diffusion is the accomplishment of such a diffusion by judicial decree. Against this doctrinal framework, the task of making complex factual determinations is replaced by the shifting of impossible burdens to the school board and the substitution of presumptions for proof. It is presumed that the intent of actions is the same as their effect; it is presumed that any action has systemwide and continuing implications; it is presumed that racial imbalance is a result of segregative acts; it is presumed that in the absence of segregative acts racial balance would occur. On this procrustean bed the facts in any desegregation case are easily stretched to achieve the predetermined result and remedy.

We respectfully submit that the Sixth Circuit has abandoned the constitutional principles established by this Court and substituted for those principles a novel and different law of desegregation. The desirable sociologic end is, in the Sixth Circuit's view, clear, and any doctrinal means to achieve that end is justified. When the means to the end becomes rewriting the law as imposed by the Supreme Court and rewriting the facts as found by the Trial Court, however, the jurisprudential result is chaos!

The District Judge in his conscientious and consistent effort to apply the law to the facts of this case has thus far succeeded only in demonstrating the impossibility of serving two quarreling masters. His judgments have now been reversed on four successive occasions, three times by the Sixth Circuit when he followed the legal doctrines established by this Court and once by this Court when he followed the mandate of the Sixth Circuit. This is a situation of judicial turmoil that should not be condoned.

The attitude of the Sixth Circuit toward the developing law

in northern desegregation cases has been apparent since Judge Edwards' emotional concurring opinion was issued on a remand of the Detroit case in 1975:

> "I join my colleagues in the drafting and issuance of today's order because any final decision of the United States Supreme Court is the law of the land. But conscience compels me to reveal how deeply I disagree with the decision which we are enforcing."

Bradley v. *Milliken*, 519 F.2d 679, 680 (6th Cir. 1975). In a remarkable opinion, he went on to declare that any distinction between northern cases and southern cases was "a formula for American apartheid" and this Court's decision in the *Bradley* case was more "fraught with disaster for this country" than any Supreme Court decision since the *Dred Scott* case. It appears that in *Dayton IV* this shout of resistance has taken the more subtle, though still rebellious form of reworking constitutional doctrines to assure that federal courts achieve the same sociologic result in states which had no statutory or constitutional mandate for segregated schools as occurred in southern states where such mandates existed.

Unless this Court is willing to delegate the rewriting of constitutional law to intermediate appellate courts on a circuit-by-circuit basis, it should feel compelled to grant certiorari in this case and analyze the doctrinal changes that are being wrought by the Sixth Circuit. Those changes do not affect simply the Dayton school system. The issue goes far beyond Dayton, although the Dayton system has by reason of the Sixth Circuit's resistance to the principles established by this Court bled through six years of litigation that can only be perceived as bewildering by the public eye.

The Columbus case has been determined by the Sixth Circuit according to the same novel standards and either is or will be before this Court on a petition for a writ of certiorari. The Cleveland case has been briefed and argued before the Sixth Circuit and is presently awaiting decision. Other desegregation cases are pending in the district courts of the circuit, and the district judges to whom those cases are assigned require guidance in view of the obvious conflicts between the pronouncements of this Court and those of the Sixth Circuit.

Without clarification by this Court the new doctrines which have been created in the Sixth Circuit may spread to other circuits as well. It was necessary to remand systemwide desegregation plans for analysis in terms of *Dayton* standards in both the Eighth Circuit and the Seventh Circuit. *School District of Omaha* v. *United States*, 433 U.S. 677 (1977); *Brennan* v. *Armstrong*, 433 U.S. 672 (1977). There has been a continuing willingness in several circuits to replace the *Arlington Heights* standards for determining intent with effect. *See, e.g., United States* v. *School District of Omaha*, 565 F.2d 127 (8th Cir. 1977), *cert. denied*, — U.S. — (1978); *N.A.A.C.P.* v. *Lansing Board of Education*, 559 F.2d 1042, 1047 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); *Hart* v. *Community School Board*, 512 F.2d 37, 51 (2d Cir. 1975). *But see Soria* v. *Oxnard School District Board of Trustees*, 488 F.2d 579, 585 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1975).

This Court has not held that mandatory busing to achieve a systemwide balance of black and white students is required in any situation where present racial imbalance is coupled with evidence of the existence of pre-1954 segregative practices. Yet such a holding is the result required in any desegregation case if the theories promulgated by the Sixth Circuit are to prevail. Present students would be penalized for violations by past school boards despite the fact that no student affected by such violations is currently attending any school in the district. Nothing in the Constitution, in principles of equity or in prior decisions of this Court can be deemed to justify or rationalize such a result.

This case, therefore, does not simply demand a restatement of established principles; it requires the curbing of new doc-

trines that threaten to sweep the law of desegregation from the constitutional moorings which this Court has established.

For all these compelling reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

A. DISTRICT COURT'S FEBRUARY 7, 1973 FINDINGS OF FACT AND OPINION OF LAW.

(Filed February 7, 1973)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

FINDINGS OF FACT AND MEMORANDUM OPINION OF LAW

This is a school desegregation suit brought as a class action by the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education. This Court has proper equity jurisdiction under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; see *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954); 349 U.S. 294,, 300-301 (1955), and under 28 U.S.C.A. §§ 1981 and 1983, 42 U.S.C.A. § 1343.

This matter is before the Court upon the briefs, stipulations and exhibits presented by the respective parties; and upon the record adduced during expedited hearing conducted by

Court from November 13 through December 1, 1972. The limited question before the Court at said hearing was whether acts by the defendant Dayton School Board have created segregated educational facilities in violation of the Equal Protection Clause.

Having carefully examined the evidence presented, the Court, pursuant to Rule 52(a), Fed. R. Civ. P., enters the following findings of fact and memorandum opinion of law.

I

FINDINGS OF FACT

A. Historical Perspective

(1) The evidence presented has established isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system.[1] Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in high schools in the 1930's and 1940's and

[1] Section 3313.48, Ohio Revised Code, provides in relevant part that:

> "[t]he Board of Education of each city . . . shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof . . ."

This has been the law of Ohio since February 22, 1887, when it was enacted by 85 Ohio Laws 34. The statute was upheld and enforced in 1888 by the Supreme Court of Ohio in *Board of Education* v. *State*, 45 O.St. 555, as follows:

> "Section 4008 having been repealed by the Act of the General Assembly passed February 22, 1887 (84 Ohio Law 34), separate schools for colored children have been abolished and no regulation can be made under 4013 that does not apply to all children, irrespective of race or color:"

the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference.[2]

Prior to *Brown*, however, physical isolation of black students ended, swimming pools were no longer restricted, and black athletic teams competed on an equal basis with all other Dayton High Schools.

While arguably consistent with the social mores of the times, the treatment of black children during this period was at least inhumane and by present standards, reprehensible. The practices of the Dayton School Board were also, during that period, in contravention of Ohio law as cited in n.1, *supra*. Both by reason of the substantial time that has elapsed and because these practices have ceased, however, the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy.

(2) Not to be dismissed on a *deminimus* theory are the practices of the Dayton School Board with regard to the hiring and placement of its teachers. In the past thirty-odd years three separate policies have been followed. Until the decade of the 1930's, there was little, if any, hiring of black teachers. Those who were hired were used in instruction of predominately black classes. During and following World War II the black population of Dayton substantially increased. Black teachers were hired in greater number, although such teachers did not teach in schools which were predominately white. While there is no direct evidence that black teachers were forbidden to teach white children at any school, in practice few actually did. Some evidence consistent with the assumption that black educators and black principals would be more understanding, sympathetic, and inspiring to black students has been suggested to the Court.

[2] For a period in the 1930's and 1940's, the Shawen Acres Orphan Home sent its black and white wards to different schools. Some white children of medical personnel of the Veterans Hospital in Dayton were bused by the hospital to "white" schools. The Dayton School Board, while not initiating these practices, condoned and assisted them.

In the 1951-52 school year, the policy of assigning black teachers only to black schools ended and black teachers were gradually assigned to white or mixed schools. By 1963, under a policy designated as one of "dynamic gradualism," at least one black teacher had been assigned to all eleven high schools and to 35 of the 66 schools in the entire system.

By 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member. In the fall of 1971, pursuant to an agreement with the Department of Health, Education & Welfare (H.E.W.), the Dayton Board of Education commenced assigning faculty in such a manner that the ratio between black and white teachers in each school substantially reflected the ratio between black and white teachers in the system as a whole. Pursuant to this agreement the teaching staff of the Dayton Public Schools became and still remains substantially integrated.

By 1969 the Dayton School Board employed more black teachers than any other of the 20 largest school districts in Ohio. At that time 28.6% of all teachers were black while 38.3% of all students were black. For the school years 1971-72 and 1972-73, blacks comprised 38% of the non-teaching, non-administrative personnel employed by the Board of Education. Employment of blacks in other positions such as skilled craftsmen, however, remains substantially below the percentage of black students population or the percentage of black teachers and black administrators.

(3) In 1933, the Paul Lawrence Dunbar High School was established. Dunbar High School was intended to be, and did in fact became, a black high school, with an all black teacher and pupil population. At the time of its creation, there were no school attendance zones in Dayton and students were permitted liberal transfers. Attendance at Dunbar was voluntary.

In the 1940's and early 1950's, after reorganization into a K-8, 9-12 grade structure, high school and elementary school

attendance zones were established and enforced in Dayton. Dunbar continued to exist as a city-wide all-black high school until it closed in 1962.

B. The Dayton Public School System Today

(a) Racial Imbalance

(4) The great majority of all schools in the Dayton system today have student populations which are racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census.[3] Except at the Patterson Co-op High School, where in the past few years a concerted effort has been made to enroll more black students, no effort has been made by the school board of Dayton to balance by race the student population at any particular school. See Appendix A, *post* at 15.

(b) Attendance Zones

(5) There has been presented no evidence of boundary changes that would channel blacks or whites into specific schools or would restrict blacks from attending any school. Where construction of new schools has required boundary changes, they have been rational, reasonable and within the sound discretion of the Board of Education. No irregular school zones have been created, white students have not been bused past black schools to white schools, nor have black students been bused past white schools to black schools.

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[3] The 1970 census for the city of Dayton indicates 71 census tracts, 45 with a black population of less than 15%, eight with a black population between 15% and 85%, and six with a black population of 85% to 100%.

While the Dayton School District is not geographically identical to the city limits of the City of Dayton, the variations are non-significant in the context of the areas' black-white population.

(6) The Dayton School District contains 57 elementary school attendance areas. No evidence has been presented of gerrymandered boundary lines and the attendance districts are regular in shape. Boundary line changes have occurred only when new schools were constructed for the purpose of relieving overcrowding in existing ones. See Appendix A, *post*, at p. 15.

(7) The middle school program was established on January 4, 1971. Middle schools consist of grades 6, 7 and 8. The middle school program has to date been only partly effectuated in the Dayton system. Elementary schools (kindergarten through eight) are still in operation as well as primary schools (kindergarten through five), and middle schools (six through eight). At the present time there are five middle schools in Dayton: Cornell Heights, Longfellow, MacFarlane, Whittier, and Orville Wright. For the racial compositions of these schools, see Appendix A, *post*, at p. 15.

Attendance boundaries for the middle schools were established in September, 1971, and have neither segregative nor integrative effect.

(8) There are presently eleven high schools in Dayton, ten of which have specific attendance areas. The eleventh, Patterson Co-op High School, enrolls students from the entire district for its vocational education program. The black percentage of attendance at Patterson High School has increased due to an altering of recruitment techniques, from 2.0% in 1963 to 32.9% in 1972. No evidence has been presented that under the present selection system the admision of blacks is denied or discouraged or that the system is segregative in effect.

Dayton has constructed five high schools since 1954 and has altered attendance zones where necessary to accommodate the overcrowding of existing high schools. Other than such alterations, no attendance zone boundaries have been changed. No evidence of the establishment of high school boundary lines for the purpose of creating white high schools and black high schools has been presented.

(c) Site selection and construction

(9) Since 1954 the school board of Dayton has constructed 14 new elementary schools and 60 elementary school additions. The construction follows the pattern of growth in the Dayton area and follows the specific policy of "building schools where children are, or where they are expected to be." New construction of elementary schools was largely on the periphery of the center city. There are instances of errors in Board planning in that some areas have not developed as expected and other developed areas have not become part of the Dayton School District, as expected. There are examples of schools operating substantially below capacity. While reasonable minds might reasonably differ on selection and construction of some schools, sufficient evidence has not been presented that school construction was segregative in nature other than to provide schools in white neighborhoods which remain predominantly white and schools in black neighborhoods which remain predominantly black.

(10) Five new high schools and fourteen high school additions have been constructed in the past eighteen years. Constructions of some high schools followed the pattern of construction of elementary schools in that sites selected were away from the center of the city and in neighborhoods which were predominately white. Other sites could have been selected near the center of the city in black neighborhoods. Such schools would arguably, at least, have had a larger proportion of white attending such schools.

Site selection is a matter of judgment and no evidence has been presented that the Board of Education failed to use neutral criteria in its choices. In the construction of schools, the Board, over the years, has been presented with options. Plaintiffs have failed to sustain their burden of showing that the defendant Board exercised those options presented in an improper fashion.

(d) Optional zones

(11) The Board of Education of the Dayton School District has from time to time created optional zones. Optional zones are dual or overlapping attendance areas which allow children residing within them a choice among two or more schools. Some optional attendance zones were created where the more distant school geographically had better access; some were created where the more distant school did not require the crossing of busy intersections, commercial areas, or railroad tracks. Many were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations. Seven optional elementary zones and four optional high school zones exist at the present time. All of the others have been abolished. See Appendix B, *post* at 16.

The majority of optional zones had no racial significance at the time of their creation. The Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth zones may have constituted exceptions to this general rule and we cannot conclude that these did not have adverse racial effects. Similarly, although none of the elementary school optional zones today have any significant potential effects in terms of increased racial separation, the same cannot be said of the high school optional zones. Two of these zones, those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past.

(e) Freedom of Enrollment

(12) By two separate actions the Board of Education has established a "freedom of Enrollment" policy. On May 29, 1969, action was taken whereby the parents of a pupil in good standing in the Dayton Public School District could request

assignment of the pupil to any school building within the district where space was available to accommodate him. Three priorities were established.

(1) Students residing within the attendance area of a school building shall have first priority to assignment to that building.

(2) Students meeting the requirements for a course available only in the particular building shall have second priority for attendance in that building;

(3) A student desiring enrollment in any building for whatever reason shall have third priority in that building, providing his enrollment will contribute to improved racial balance in that building.

The action of May, 1969, further provided that transportation would be the responsibility of the parents.

On January 3, 1972, the Board of Education resolved to continue the Freedom of Enrollment policy with the exception that the Superintendent and his staff were directed to develop and submit before the start of the second semester of the 1971-72 school year a plan providing for the free transportation of the students participating in such program. Such free transportation was adopted by the Board prior to the filing of the complaint herein.

(13) Applications for transfer and dispositions thereof during the school years 1969-1970, 1970-71, 1971-72, 1972-73, are set forth in Appendix C, *post*, at 17. There is no evidence that the Freedom of Enrollment system has been unfairly operated or that black students have been denied transfers because of their race. There is evidence that the capacity of transferee schools has been underestimated and that projections of future enrollment are substantially overestimated. A neutrally administered freedom of enrollment system might in the future reduce somewhat racial imbalance and remove community perception of "black" and "white" schools. However, as the Freedom of Enrollment system is presently constituted, its input towards that goal has been slight. Requests for

transfer have at no time exceeded 1.5% of the total student enrollment.

C. School Board Action — December, 1971 January, 1972

(14) At the general election in November, 1971, the electors of the school district of Dayton elected three members for a four year term commencing January 1, 1972. Issues at such election involved the matter of school attendance zones and transportation of pupils. Two incumbent members of the Board ran for reelection, one did not. One incumbent was reelected and two new members of the Board were added. On December 8, 1971, the 1971 Board met to consider resolutions dealing with transportation of students and zone attendance lines. All members present were duly elected, qualified and acting members of the Board, although two of them were so-called "lame ducks," who would not be members of the Board after December 31, 1971.

The Board adopted several resolutions. These resolutions recognized the existence of racial segregation in the Dayton schools, the role played by the Board in the creation of the racial patterns and the concommitant responsibility of the Board to eradicate these patterns through affirmative action. The types of affirmative action recognized included the elimination of the old attendance zones and the transportation of students for the purpose of achieving the city-wide racial balance of students. These resolutions, which are set forth in part in Appendix D, *post*, at 18-22, were adopted by the Dayton School Board by a vote of 5-2.

Immediately thereafter, one member of the Board who had voted with the majority, requested reconsideration and was improperly ruled out of order. The Board met subsequently on December 6, 1971 [sic], and January 3, 1972. At the end of the latter meeting, the Board ended its term of office and the 1972 Board took its place. On January 3, at its first meeting, the 1972 Board rescinded the resolutions passed on

December 8. Since the 1971 Board had passed out of existence, the action of the 1972 Board on January 3, 1972, was not in the nature of a reconsideration but instead was a recission of the previous action.

The right of the majority to override protected minority rights has clear limitations in our constitutional democracy. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); also see *Alkire* v. *Cashman*, — F.Supp. — (S.D. Ohio E.D. 1972). The recission in early 1972 of the resolutions adopted by the 1971 School Board constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton. See *Bradley* v. *Milliken*, 433 F.2d 897 (C.A.6 1970); *Oliver* v. *Kalamazoo Board of Education*, 346 F.Supp. 766 (W.D. Mich. S.D. 1971), *aff'd.* 448 F.2d 635 (C.A.6 1971).

OPINION

An examination of the decisional law of this circuit does not provide an identifiable category for the Dayton Public School System. Ohio law, unlike the law of many Southern states, has never mandated the separation of the races in public school; to the contrary, since 1887 it has specifically prohibited this practice. See n.1, supra. The Dayton system is a square peg for the round holes of Memphis, Knoxville, and other southern cities.[4] It is, however, also a round peg

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[4] Compare, for example, the intransigence of the Nashville School Board in *Kelley* v. *Metropolitan County Bd.*, —— F.2d —— Nos. 71-1778 & 79 (C.A. 6 May 30, 1972). See also *Northcross* v. *Board of Education of Memphis*, 420 F.2d 546 (C.A.6 1970), *aff'd.* 397 U.S. 232 (1970); 444 F.2d 1179, 1184 (C.A.6 1971); *Goss* v. *Board of Education of Knoxville*, 301 F.2d 164 (C.A.6 1962); 305 F.2d 523 (C.A.6 1962); 406 F.2d 1183 (C.A.6 1969); 444 F.2d 632 (C.A.6 1971); *motion for implementation order denied*, 403 U.S. 956 (1971); *Robinson* v. *Shelby County Board of Education*, 442 F.2d 259 (C.A.6 1971); *Mapp* v. *Board of Education of City of Chattanooga*, —— F.2d —— (C.A.6 October 11, 1972), *rehearing en banc granted* —— F.2d —— (C.A.6 1972).

for the square hole that is Cincinnati in *Deal* v. *Board of Education.*[5] In *Deal,* which dealt with an urban school system organized under the laws of Ohio, there was no finding that the actions of the school board had contributed in *any* fashion to the segregation of the Cincinnati public schools. We have not found the *Keyes* situation of the transfer of whites to remaining predominately white schools.[6] We have not found the *Bradley* altered attendance zones or the transfer programs that allowed whites to escape from identifiably black neighborhood schools.[7] We have not found the *Davis* pattern of racial discrimination.[8]

What we have found are racially imbalanced schools, optional attendance zones, and recent Board action, which are cumulatively in violation of the Equal Protection Clause. We hold that the totality of these findings require intervention by this Court under the mandate of *Brown* v. *Board of Education, supra.*

We do not hold that a school board may not in its wisdom determine to establish 'neighborhood schools." *Gilliam* v. *School Board of Hopewell,* 345 F.2d 325; *Deal, supra*; *Goss, supra.* But an "optional attendance zone" is a limitation upon this

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[5] 369 F.2d 55 (C.A.6 1966); 419 F.2d 1387 (C.A.6 1969), *cert. den.* 402 U.S. 962 (1971).

[6] *Keyes* v. *School District No. 1,* 303 F.Supp. 279, 289 (D.C. Colo. 1969); 313 F.Supp. 61, 90 (D.C. Colo. 1970), *aff'd. in part, rev'd. in part,* 445 F.2d 990 (C.A.10 1971), *cert. granted* —— U.S. —— (1972).

[7] *Bradley* v. *Milliken,* 338 F.Supp. 582 (E.D. Mich. 1971), *aff'd.* —— F.2d ——, Nos. 72-1809, 72-1814 (C.A.6 Dec. 8, 1972), *rehearing en banc granted* —— F.2d —— (C.A. 6, Jan. 16, 1973). See also *Clemons* v. *Board of Education of Hillsboro,* 228 F.2d 853 (C.A.6 1956).

[8] *Davis* v. *School District of Pontiac,* 443 F.2d 573 (C.A.6 1971), *cert. den.* 404 U.S. 913 (1971).

concept and if carried to an ultimate conclusion, effectively destroys it. If a school board elects to use the neighborhood school concept, it must do so fully and completely. Where there are hazards, natural or artificial, it must so adjust the boundaries in order to protect the children it intends to educate. It may not employ optional zones either to destroy or dilute the neighborhood school concept.

In addition, there appear to be aspects of the system which may in the future become segregative in effect unless steps are now taken that will retard these undesirable tendencies. Without seeking to calibrate the degree of segregation that inheres in individual policies of the Board, we hold that these must be refashioned in such manner as to avoid such future racially disharmonious potential.

Accordingly, the Dayton School Board is hereby instructed to prepare and present to this Court within sixty (60) days a plan that will accomplish the following:

(1) Abolish all optional attendance zones presently remaining within the Dayton school system;

(2) Restate the priorities for high school attendance in the freedom of enrollment plan in order that no student of a minority race may be denied attendance at any high school in the Dayton Public School System and so that transfers for purpose of improving racial balance take precedence over curriculum transfers;

(3) Maintain faculty assignment policies that will reflect in each school the approximate ratio of black to white faculty throughout the district.

(4) Establish hiring policies that will enable the clerical and maintenance personnel hired by the school board of Dayton to approximate the proportion of black-to-white ratio of the Dayton School District.

The foregoing enumerated specifics shall be considered as a minimum. The plan submitted by the defendant Board shall

in all other respects conform to the requirements of law. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970); *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 402 U.S. 33 (1970).

Irrespective of the determination of this Court there will remain in the city of Dayton a substantial black population entitled as a matter of law to equality in education, housing, and job opportunity. No peaceful community can consist of two separate societies viewing each other with mistrust and suspicion from ever higher walls of separation. Education has been historically in our country and remains to this day, one of the primary means of overcoming barriers of class, status and occupation.

A court can only enjoin upon a school board its legal duty. It cannot reach the infinitely more sensitive moral obligation that defies legal measurement. We commend to the School Board of the City of Dayton its moral obligation to provide the highest possible level of education equally for all children entrusted to its care, without distinction or bias or partiality.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX A, FEBRUARY 7, 1973 FINDINGS OF FACT RACIAL COMPOSITION OF DAYTON PUBLIC SCHOOLS (1971-1972)

Elementary schools — % Black:

1. Jane Addams	81.7	27. Jackson Primary	98.8
2. Allen	0.6	28. Jefferson Ele.	60.1
3. Belle Haven	5.0	29. Jefferson Primary	57.1
4. Belmont	0.0	30. Kemp	0.0
5. Brown	0.6	31. Lewton	0.0
6. Carlson	99.0	32. Lincoln	0.0
7. Cleveland	0.0	33. Loos	4.6
8. Drexel	5.7	34. Horace Mann	0.2
9. Eastmont	0.0	35. McGuffey	14.4
10. Edison	97.3	36. McNary Park	99.4
11. Emerson	6.8	37. Meadowdale Ele.	8.0
12. Fairport	0.1	38. Miami Chapel	99.9
13. Fairview Elementary	1.7	39. Patterson-Kennedy	0.0
14. Ft. McKinley	0.0	40. Residence Park Ele.	98.8
15. Franklin	0.0	41. Residence Park Pri.	99.3
16. Gardendale	28.5	42. Ruskin	7.0
17. Gettysburg	5.2	43. Shiloh	0.1
18. Gorman	21.1	44. Shoup Mill	7.1
19. U.S. Grant	0.1	45. Louise Troy	100.0
20. Grace A. Greene	96.8	46. Valerie	7.5
21. Hawthorne	0.0	47. Van Cleve	1.1
22. Hickorydale	6.6	48. Washington	19.4
23. Highview	97.0	49. Weaver	99.9
24. Huffman	0.0	50. Webster	0.0
25. Irving	99.0	51. Westwood	99.4
26. Jackson Elementary	99.1	52. Wogaman	100.0

Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.1% black.

Middle schools – % Black:

1. MacFarlane 99.6
2. Whittier 99.3
3. Cornell Heights 80.5
4. Longfellow 64.1
5. Orville Wright 8.1

High Schools – % Black:

1. Dunbar 100.0
2. Roosevelt 100.0
3. Roth 95.8
4. Colonel White 54.6
5. Patterson Co-op 32.9
6. Fairview 24.1
7. Stivers 14.0
8. Meadowdale 10.6
9. Kiser 9.8
10. Wilbur Wright 9.2
11. Belmont 5.2

APPENDIX B TO FEBRUARY 7, 1973 FINDINGS OF FACT
EXISTING OPTIONAL ZONES

Optional Zone	Date of Creation	Percentage Black School Population At date of creation	1972-73
Elementary schools:			
1. Belle Haven/	1955	0.0	17.7
Fort McKinley		0.0	2.6
2. Residence Park/	1954	a.	100
Jane Addams		29.3 b.	78.7
3. Westwood Ele./	1952	0.0	99.7
Jackson Ele.		35.9	99.9
4. Lincoln/	1957	0.0	0.6
HoraceMann		0.0	3.1
5. Cleveland/	1956	0.0	0.8
Belmont Ele.		0.0	9.4
6. Grant/	1957 c.	0.0	0.3
Belmont		0.0	9.4
7. Eastmont	1957 c.	0.0	0.7
Lewton		0.0	5.8
High schools:			
1. Fairview/	1965	0.9 c.	24.1
Roth		53.5 c.	95.8
2. Roosevelt/	1951	31.5	100.0
Colonel White	extended 1958	0.0	54.6
3. Kiser/	1962	2.7 c.	9.8
Colonel White		1.1 c.	54.6
4. Wilbur Wright/	1956	2.2 b.	9.2
Belmont High		0.0	5.2

a. Figures not available
b. Figures as of 1951
c. Figures as of 1963-1964

APPENDIX C TO FEBRUARY 7, 1973 FINDINGS OF FACT
FREEDOM OF ENROLLMENT APPLICATIONS

	1969-70 1970-71	1971-72	1972-73
White applications	133	78	47
Black applications	695	757	741
Totals	828	835	788
White approvals	50	39	23
Black approvals	421	460	460
Totals	471	499	483
White disapprovals	83	76	15
Black disapprovals	274	260	187
Totals	357	336	202
White disapprovals (Lack of classroom space)	16	8	12
Black disapprovals (Lack of classroom space)	164	174	166
Total disapprovals (Lack of classroom space)	180	182	178

APPENDIX D TO FEBRUARY 7, 1973 FINDINGS OF FACT
RESOLUTIONS OF THE DAYTON SCHOOL BOARD

At the December 8, 1971, meeting of the Dayton School Board, the following three resolutions were passed, each by a 5-2 vote:

RESOLUTION SEEKING JOINT ACTION TO END SEGREGATION IN EDUCATION, HOUSING AND EMPLOYMENT IN THE METROPOLITAN DAYTON AREA

WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions and inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

2. That this Board recognizes that past actions or inactions

of the Board of Education and residential racial segregation are interdependent phenomena.

3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society.

RESOLUTION ASKING FOR STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS

WHEREAS, The Committee of 75 has recommended school integration on a metropolitan basis, and

WHEREAS, the State of Ohio has responsibility and authority for the operation of public schools, and the State Board of Education has the duty to administer the laws relating generally to the operation of the schools, and

WHEREAS, the Ohio Attorney General has ruled that the State Board of Education has the authority to restrict funding in any school district in which said Board finds as a matter of fact that racial segregation exists,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby petitions the State of Ohio and the State Board of Education (a) to obtain from Ohio Civil Rights Commission, U.S. Office of Education and such other sources as it may deem useful, data on racial isolation of faculty, staffs and pupils within and among the several school districts as presently constituted in the metropolitan Dayton area; (b) to develop guidelines and criteria as may be necessary to assure an educationally and socially viable mix of pupils, within the socio-economic characteristics of the metropolitan area as a whole; (c) to require said districts to cooperate in preparing and implementing a plan for assignment of faculty, staffs and pupils in accordance with said guidelines and criteria, and (d) to assure adequate funding from state and district sources to continue the operation of the schools and the implementation of said plans throughout the period of transition and thereafter.

2. That said plans be developed by September 1, 1972 and fully implemented not later than September 1, 1973.

3. That the Clerk of the Board forward a true copy of this resolution to the Governor of the State of Ohio, the Speaker of the House of Representatives, the President of the Ohio Senate and the President of the State Board of Education.

• • •

RESOLUTION ORDERING THE RACIAL AND ECONOMIC INTEGRATION OF PUPILS IN THE DAYTON PUBLIC SCHOOLS

WHEREAS, the Board of Education of the Dayton City School District recognizes a moral and legal duty to provide quality non-segregated education for all students in the district, and,

WHEREAS, integrated education is vital to the achievement

of quality education for all pupils, black and white, rich and poor, and,

5. That this Board view the racial and ethnic mix of the Dayton City School District and of the metropolitan area as assets; that this population, if reflected in each school, could itself contribute to people's learning from each other; and that as a whole, the metropolitan area represents a nearly ideal cross section of the nation that could permit schools here to become a model of American democracy in action.

6. That this Board hereby invites and urges agencies of the federal, state, and local governments and organizations of religious, business, labor, education, communications, civic service, and real estate to assist the Board in desegregation of Dayton schools and to pledge publicly their accelerated efforts to bring about desegregation in housing, education and employment throughout the Dayton metropolitan area.

7. That the Clerk of The Board be and hereby is directed to forward a true copy of this resolution to the following:
   Governor of the State of Ohio
   President of the State Board of Education
   Speaker of the Ohio House of Representatives
   President of the Ohio Senate
   Montgomery County Members of the Ohio General Assembly and United States Congress.
   Montgomery County Commissioners
   Dayton City Commissioners
   Montgomery County Council of Governments
   City Plan Board
   Miami Valley Regional Planning Commission
   Miami Valley Regional Transit Authority
   Metropolitan Housing Authority
   Apartment Owners Associations
   Area Progress Council

   Assembly of Area Councils
   Chairmen of Democratic and Republican Organizations
   Community Affairs Committee
   Congress of Representative East Dayton Organizations
   Dayton Advisory Council on Education
   Dayton Area Board of Realtors
   Dayton Area Chamber of Commerce
   Dayton Area Junior Chamber of Commerce
   Dayton Building Trades Council
   Dayton Classroom Teachers Association
   Dayton-Miami Valley AFL-CIO
   Dayton Model Cities Planning Council, Inc.
   Dayton Public Service Union
   Dayton Urban League
   Deans of Area Colleges of Education
   Elementary Principals Association
   Metropolitan Churches United
   Miami Valley Consortium of Colleges and Universities
   Montgomery County Community Action Agency
   Montgomery County Council of PTAs
   National Association for the Advancement of Colored People
   Ohio Association of Public School Employees
   Presidents Club
   Secondary Principals Association
   Southern Christian Leadership Conference

WHEREAS, the Fourteenth amendment to the United States Constitution and the mandate of the United States Supreme Court in Brown v. Board of Education decision and subsequent court decisions place an affirmative duty to dis-establish the segregated attendance patterns which result in whole or in part from its actions and inactions in order to equalize educational opportunity, and,

WHEREAS, segregated educational opportunity and unequal educational opportunities for minority and poor students now exist in the Dayton public schools, and,

WHEREAS, this inequality exists as a result of the acts and omissions of the Board and preceding Boards in their decisions concerning the site selection of school buildings, size of school buildings, changes and adoption of school attendance boundaries, pupil assignment practices, faculty and staff hiring and assignment practices and,

WHEREAS, this Board has requested and received reports of findings and recommendations from the State Department of Education and the Committee of 75,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton that it is the policy of this Board that each school shall enroll pupils in a manner which substantially reflects the racial and economic characteristics of the district as a whole. The Board recognizes that implementation of this policy requires departure from past practices and requires special planning to assure a smooth transition. The Board therefore directs:

1. That the superintendent in consultation with professional staff and the representatives of employee organizations, design and implement a mandatory program of in-service education involving all staff members to prepare staff for changes in enrollments and to develop an individualized, multi-ethnic curriculum in each school.

2. That Dayton Advisory Council on Education be requested to organize a Community Involvement Advisory Committee and a Lay Citizens Financial Review Committee to advise the superintendant during the course of planning and implementing integration programs, as recommended by the Committee of 75.

3. That the superintendent be and hereby is directed to develop and implement plans for the racial and economic integration of pupils using the following guidelines and criteria:

   a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

   b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

   c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

   d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

   e. Desegregation is to be completed by September, 1972.

   f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criterial in c. above.

   g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy.

4. That to the maximum feasible extent consistent with this policy statement, recommendations of the Committee of 75, are hereby adopted and may be used in planning and implementing school integration.

5. That the superintendent report on progress and problems concerning implementation of this policy at least every sixty days and that a program for continuous evaluation throughout the phases of implementation be developed by July 31, 1972.

6. That the superintendent prepare applications for supplementary financial assistance from state, federal and other sources that may become available to improve the quality of education and achieve the goals of the Committee of 75 report.

B. DISTRICT COURT'S JULY 13, 1973 SUPPLEMENTAL OPINION ON REMEDY.

(Filed July 13, 1973)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al,

Plaintiffs

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al,

Defendants

SUPPLEMENTAL ORDER ON REMEDY

Pursuant to order of this Court dated February 7, 1973, the defendant School Board of the City of Dayton has submitted a desegregation plan for consideration. A separate plan has been submitted by the minority members of the Dayton School Board, as has one by the Dayton Classroom Teachers' Association, whose motion to file as amicus curiae in this matter is hereby GRANTED. Exhaustive memoranda have likewise been filed by interested parties. The matter is now before the court for determination.

The plan submitted by the defendant Board contains eleven points: Four are directed to the specific requirements imposed by this Court and seven are in response to the Court's suggestion that additional action be undertaken. Such additional action was not specifically mandated by the Court. We do, however, note our disappointment at the limited nature of Points V through XI. While defendant School Board can assert that it was not required by the Court to go as far as it has, a response can be made with equal accuracy that the community relies on the elected members of the School Board to approach the present problem in a sensitive and understanding fashion. The Board's proposals, unfortunately, do not convince us that they have completely attained this desired goal.

We turn to the four points of the plan required by the Court's order. Point I eliminates the optional zones and their attendant segregatory effects. Point III provides for non-racially based faculty assignment practices. Point IV provides for the proper hiring policies of classified personnel. Points I, III and IV are in accord with the requirements of the Court's previous order and as to them, the plan of defendant School Board of the City of Dayton is hereby APPROVED.

Point II, however, which deals with Freedom of Enrollment Priorities, does not entirely meet the required standards. It will be conditionally accepted for elementary schools and middle schools for the school year 1973-74. It will not be accepted for the high schools.

As to the Dayton high schools, the Board is hereby directed to achieve the following:

(1) Any student eligible to attend a Dayton public high school may attend any high school within the Dayton Public School district, provided that students presently enrolled in high schools shall have first priority to complete their education therein.

(2) Each incoming ninth grade class and all vacancies in the tenth, eleventh and twelfth grade classes Where there is insufficient capacity for all pupils seeking admission, a random selection plan shall be used.

(3) Only insufficient capacity shall be deemed reason to exclude any applying pupil.

(4) Transportation shall be the responsibility of the Board of Education for all students eligible and approved for transfer outside of the attendance area of such students' residences.

The defendant Board of Education will submit to this Court within thirty (30) days of the date of this Order a revised plan to comply with the above. Included in such plan will be a listing of the pupil capacity by grade of each of the high schools within the Dayton Public School District. Plaintiffs will be granted an opportunity to present evidence as to such capacity. The foregoing admission plan shall not apply to the Patterson-Stivers Vocational High School.

There remain for consideration two further questions which the Court has reserved: The matter of the so-called Metropolitan School District and the status of defendants State of Ohio through its Governor and the Ohio Department of Education.

The findings by the Court in its Order of February 7, 1973, and the disposition of the Board of Education's plan appear to moot the metropolitan question and to require the dismissal of these non-Dayton defendants. Plaintiffs are hereby granted thirty (30) days within which to file memoranda on either or both of these questions. Defendants are granted thirty (30) days from the date of such filing to file answer memoranda and plaintiffs are granted thirty (30) days from defendants' filing to file reply memoranda. An evidentiary hearing will be granted upon either of such questions upon the showing of a need therefor.

This supplemental Order has been delayed pending study of the decision of the Supreme Court of the United States in *Keyes* v. *School District No. 1, Denver, Colorado,* —— U.S. ——, 42 U.S.L.W. 5002 (June 21, 1973). The *Keyes* case dealt, for the first time, with a large northern city whose school

system had never been operated under mandatory segregation laws, but which had nevertheless acted in a way that helped create a racially segregative system. It is significant both as a major landmark in the continuing definition of the Equal Protection clause within the context of school desegregation that began with *Brown* v. *Board of Education,* 347 U.S. 483 (1954); and as an indication of the views and attitude of the present Supreme Court. It will of necessity have a major impact upon the future direction of the public school systems in the United States including the one in Dayton, Ohio.

The concurring opinion of Justice Powell must rank among the clearest and most logical expositions of a most troubling and difficult subject. This court proposes to follow the rationale set forth by Justice Powell. We place the burden upon the Board to comply to the fullest extent possible with the views stated therein. We place particular significance on the following statement of Justice Powell:

> "The Term, 'integrated school system,' presupposes, of course, a total absence of any laws, regulations or policies supportive of the type of 'legalized' segregation condemned in *Brown*.
>
> "A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to: (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instructions and curricula opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close to old ones, and determine the size and grade categories with the same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind."

This Court likewise adopts as its guiding definition the following statement from Justice Powell:

> "An integrated school system does not mean, and indeed could not mean, in view of the residential patterns of most of our major metropolitan areas, that *every school* must in fact be an integrated unit. A school which happens to be all or predominately white or all or predominately black is not a 'segregated' school in an unconstitutional sense if the system itself is a genuinely integrated one."

Keyes v. *School District No. 1, Denver, supra,* 41 U.S.L.W. at 5012.

Relating the standards established by Justice Powell to the Dayton situation, the Court has found that appropriate steps to integrate faculties and administration have been instituted and will be continued. There has been and there will be an increasing level of transportation of students for the purpose of promoting integrative opportunities through the Freedom of Enrollment priorities.

There is presently no evidence of a failure of equality of facilities, instructions and curricula opportunities nor has there been a persuasive proof that the Board, in recent times, drew attendance lines or built new facilities for the avowed purpose of minimizing integration. However, there has been evidence which indicates that the affirmative promotion of integration through these essential functions of the Board has not held an important place in the Board's priorities.

The Powell rationale will operate prospectively. The Board's planning and implementation units must become capable of and sensitive to the racial effects which flow from the drawing of attendance lines, the construction and improvement of school facilities and the assignment of faculty, staff and pupils. All of such actions must henceforth be examined for their "integration impact."

These are long range goals and a further opportunity should be given to the Dayton School Board in which to plan and implement them. Accordingly, while this Court is most reluctant to continue a "federal receivership" of the Dayton School System, see *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5022 (Rehnquist, J. dissenting), it would seem that a proper disposition of this problem requires a retention of jurisdiction while a reasonable period of time is given to the School Board for this purpose. Therefore, as to these long-range criteria, the Court will re-examine the Dayton School System at the end of academic year 1973-74 and determine, at that time, whether or not additional judicial action is required.

Nothing that we have said today should be interpreted as a repudiation of the neighborhood school concept. To the contrary, it is this concept which often represents the bedrock strength of the public school systems and steps may be properly taken to preserve it. See *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5018-5020 (Powell, J., concurring in part and dissenting in part); *Deal* v. *Cincinnati Board of Education,* 396 F.2d 55, 60 (C.A.6 1966). Where school lines in Dayton have been drawn without improper racial intent, they will be allowed to stand. Where they have not yet been drawn, as in the case of the still embryonic system of middle schools, they should be drawn in such a way as to maximize integrative goals.

The essential principle which guides this Court is a paraphrase from *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 at pages 15-16.

It is the function of the federal courts only to eliminate a deprivation of constitutional rights; it is the duty of local school boards to operate and maintain integrated school systems.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

C. COURT OF APPEALS' AUGUST 20, 1974 OPINION.

(Filed August 20, 1974)

Nos. 73-1974-75

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BRINKMAN, ET AL.,
Plaintiffs-Appellants,

v.

JOHN J. GILLIGAN, ET AL.,
Defendants-Appellees.

MARK BRINKMAN, ET AL.,
Plaintiffs-Appellees,

v.

DAYTON BOARD OF EDUCATION,
Defendants-Appellants.

APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.

Before PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PHILLIPS, Chief Judge. This is a school desegregation case directed against the public school system of Dayton, Ohio. For the reasons set forth below, we affirm in part and remand the case to the District Court for further proceedings.

Plaintiffs-appellants are black and white Dayton parents who bring this class action on their own behalf, on behalf of their minor children, and on behalf of all others similarly situated.

In addition, the National Association for the Advancement of Colored People (NAACP) joined as a party plaintiff. The complaint named the Governor of Ohio, the Attorney General of Ohio, the Ohio State Board of Education, the Superintendent of Public Instruction of the Ohio Department of Education, the Dayton Board of Education, the six individual members of the Dayton Board and the Superintendent of the Dayton School District as parties defendants.[1] The Dayton Board of Education has cross appealed.

I. Chronology of Proceedings

In their complaint filed on April 17, 1972, appellants sought, *inter alia,* an injunction enjoining the Dayton defendants from continuing their allegedly unconstitutional policy of operating the public schools in Dayton in a manner that perpetuated racial segregation. The complaint further averred numerous racially discriminatory practices for which the State defendants had allocated educational resources.

The complaint was filed in the United States District Court for the Southern District of Ohio, Eastern Division, which is located at Columbus, Ohio, rather than in the Western Division at Dayton (the situs of the subject schools) on the basis that the State defendants were domiciled in Franklin County (Columbus). Motions to dismiss for failure to join necesary parties and for improper venue and alternative motions to transfer the action to the District Court at Dayton were filed by the State defendants, the Dayton Board of Education and three individual Dayton Board members. On June 22, 1972, the District Court overruled the motions to dismiss for improper venue and denied the motions to transfer, but did not

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[1] Hereinafter, the Governor, Attorney General, State Board of Education, and the Superintendent of Public Insiruction will sometimes be referred to collectively as the "State defendants." Hereinafter, the Dayton Board of Education, its members, and its Superintendent sometimes will be referred to collectively as the "Dayton defendants."

rule on the motion to dismiss for want of necessary parties. Thereafter, on July 24, 1972, the Dayton defendants and the State defendants filed their answers denying the material allegations of the plaintiffs' complaint.

In accordance with the proposed order of procedure, an expedited hearing before District Judge Carl B. Rubin, was conducted from November 13 through December 1, 1972, limited to the single issue of whether the school system of Dayton was a segregated one by reason of acts of the Dayton Board of Education. On February 7, 1973, the District Court filed its Findings of Fact and Memorandum Opinion of Law in which it found that (1) racially imbalanced schools, (2) optional attendance zones, and (3) rescission by the Dayton Board of Education of three resolutions calling for racial and economic balance in each school in the Dayton system were "cumulatively in violation of the Equal Protection Clause" of the Constitution. In its February 7, 1973, decision, the District Court ordered the Dayton Board to submit a plan which would (1) abolish all optional zones, (2) restate the priorities of the Board's Freedom of Enrollment program so that racial transfers would take precedence over curriculum transfers, (3) maintain faculty assignment practices so that each school would continue to reflect the approximate ratio of the total black to white faculty in the Dayton system, and (4) establish hiring practices that would enable the clerical and maintenance personnel employed by the Board to approximate the proportion of black-to-white population existing within the Dayton system. The District Court further stated that the foregoing elements "shall be considered as a minimum" and that the plan to be submitted by the Board should otherwise conform in all respects to the requirements of law, citing *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971).

In compliance with the February 7, 1973, order of the District Court, the Dayton Board on March 19, 1973, submitted

a desegregation plan to the District Court. This plan contained eleven points which are summarized below:

I. Elimination of Optional Zones – eliminated optional attendance zones for elementary and high school students.

II. Freedom of Enrollment Priorities – revised the system's Freedom of Enrollment program in accordance with a specified set of priorities.

III. Faculty Assignment Practices – provided that faculty assignments for each school in the system should reflect the ratio of white to black faculty in the entire system.

IV. Hiring Policies for Classified Personnel – provided that blacks would be hired for classified positions, e.g. clerical, custodial and food service staff, to reflect the proportion of the black-to-white population residing within the Dayton School District.

V. Science Environmental Program – proposed the establishment of a city-wide elementary science program guided by a trained staff working at four centers. The program was to be mandatory and children were to be bused to produce a racial mix that approximates the ratio between black and white students in the system as a whole.

VI. Patterson-Stivers Vocational High School – combined two existing vocational schools into a new unified cooperative school with a district-wide attendance area.

VII. The Musical Stereopticon – formed an elementary and high school band orchestra and chorus on an all-city basis.

VIII. Integrated Athletics – required schools that have no minorities on their teams to schedule schools that do have minorities represented. High school schedules were to be administered by a central athletic office to insure that racial isolation did not exist.

IX. Minority Language Program – required all classroom teachers and administrators at the elementary school level to participate in a series of in-service workshops on linguistic differences that exist in American English.

X. Living Arts Center – created departments in art, creative writing, dance and drama to permit studets, teachers, and parents to expand their knowledge in these areas.

XI. Control Centers – created rumor control centers, school guidance centers, and area learning centers to create a more secure climate for quality education in the school system.

In addition to the plan submitted by the Dayton Board, separate plans were submitted to the District Court by the minority members of the Dayton Board and the Dayton Classroom Teachers' Association. The Board minority submitted its more comprehensive plan because it believed that the plan of the Board majority would maintain the status quo and hence did not comply with the February 7, 1973, order of the District Court to conform in all respects with *Swann, supra,* and *Davis supra.* Further, the plaintiffs-appellants filed objections to the plan of the Board majority primarily on the grounds that the majority plan "froze in" the present unconstitutional system of segregation and would fail to eliminate racialy identifiable schools when other alternative remedies, such as busing of children to other schools, were available.

On July 13, 1973, after considering the three desegregation plans before it, the District Court issued its Supplemental Order on Remedy. The District Court essentialy accepted the plan of the Board majority except that the Dayton Board was ordered to submit a freedom of choice plan for the Dayton high schools. The District Court, however, expressed its "disappointment at the limited nature of Points V through XI"

of the plan of the Board majority, and stated that the desired goal was not attained completely by the majority plan.

The District Court then stated:

> "There remain for consideration two further questions which the Court has reserved: The matter of the so-called Metropolitan School District and the status of defendants State of Ohio through its Governor and the Ohio Department of Education.
>
> "The findings by the Court in its Order of February 7, 1973, and the disposition of the Board of Education's plan appear to moot the metropolitan question and to require the dismissal of these non-Dayton defendants. Plaintiffs are hereby granted thirty (30) days within which to file memoranda on either or both of these questions. Defendants are granted thirty (30) days from the date of such filing to file answer memoranda and plainiffs are granted thirty (30) days from defendants' filing to file reply memoranda. An evidentiary hearing will be granted upon either of such questions upon the showing of a need therefor."

The District Court concluded its July 13, 1973, order as follows:

> "Nothing that we have said today should be interpreted as a repudiation of the neighborhood school concept. To the contrary, it is this concept which often represents the bedrock strength of public school systems and steps may be properly taken to preserve it. See *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5013-5020 (Powell, J., concurring in part and dissenting in part); *Deal* v. *Cincinnati Board of Education,* 396 F.2d 55, 60 (C. A. 6 1966). Where school lines in Dayton have been drawn without improper racial intent, they will be allowed to stand. Where they have not yet been drawn, as in the case of the still embryonic system of middle schools, they should be drawn in such a way as to maximize integrative goals.

"The essential principle which guides this Court is a paraphrase from *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 at pages 15-16.

"It is the function of the federal courts only to eliminate a deprivation of constitutional rights; it is the duty of local school boards to operate and maintain integrated schools systems."

Following the July 13, 1973, order of the District Court, the plaintiffs-appellants in a letter dated July 26, 1973, reminded the District Court that by its own order of procedure evidence with respect to the metropolitan and state aspects of the controversy had been excluded from the earlier hearing. On August 10, 1973, the Dayton Board submitted a revised plan incorporating the court's freedom of choice plan for the Dayton high schools. The plaintiffs-appellants filed their notice of appeal from the two orders of the District Court on July 23, 1973. The Dayton Board cross appealed from those orders on August 13, 1973.

Thereafter, on September 25, 1973, the Dayton Board moved this court to dismiss the pending appeal of the plaintiffs-appellants for want of jurisdiction on the ground that no final order had been entered by the District Court. In an unreported order filed on January 17, 1974, this court denied the Dayton Board's motion to dismiss, saying:

"Said motion to dismiss is hereby denied, it appearing to the court that the District Judge's supplemental order on remedy, dated July 13, 1973, approves a proposed desegregation plan with added instruction as to how it is to be carried into effect, and hence, appears to be in the nature of a temporary injunction under 28 U.S.C. § 1292(a)(1) (1970)."

We have heard oral arguments and the case is now before the court for decision.

II. Historical Background of School Segregation in Dayton

Ohio law has long mandated an integrated public school system. Ohio Revised Code, § 3313.48, provides in relevant part:

"The board of education, of each city, exempted village, local, and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof."

This has been the law of Ohio since February 22, 1887, when it was enacted by 84 Ohio Laws 34. That statute was upheld by the Supreme Court of Ohio in 1888 in *Board of Education* v. *State*, 45 Ohio St. 555, 556, 16 N.E. 373, in which the court stated:

"[S]ection 4008 having been repealed by the act of the general assembly passed February 22, 1887 (84 Ohio L. 34), separate schools for colored children have been abolished and no regulation can be made under section 4013, that does not apply to all children irrespective of race or color."

Further, the District Court made the following historical determination, that is not challenged on appeal, as a finding of fact:

"(1) The evidence presented has established isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system. Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in high schools in the 1930's and 1940's and the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference." (Footnotes omitted.)

The physical segregation into separate buildings of pupils and teachers by race was ruled illegal in *Board of Education of School District of City of Dayton v. State, ex rel. Reese*, 114 Ohio St. 188, 189, 151 N.E. 39 (1926).

In 1956, following *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Ohio Attorney General ruled that the Ohio State Board of Education had the primary responsibility for administering the laws relating to the distribution of state and federal funds to local school districts and that such funds should not be distributed, absent good and sufficient reasons, by the State Board to local school districts which segregated pupils on the basis of race in violation of *Brown*. Despite protests over the past twenty years from the Dayton branch of the NAACP and others, the Dayton Board has maintained a system wherein the great majority of schools today have student populations which are racially imbalanced. The State Board of Education has permitted this system to continue with a steady flow of state and federal money.

On March 17, 1969, the Acting Director of the Office for Civil Rights, United States Department of Health, Education and Welfare (HEW), notified the Dayton School authorities that, as a result of a compliance review conducted by federal officials, his office had concluded that the Dayton school district was not complying with Title VI of the Civil Rights Act of 1964. In particular, the Acting Director stated:

> "An analysis of the data obtained during the review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff. Thus, all Negro principals are assigned to predominantly Negro schools, as are 11 of the 14 Negro assistant principals; 156 out of 181 Negro high school teachers are assigned to schools where Negroes constitute 92 percent of the total enrollment. Over 85 percent of the Negro elementary teachers instruct in schools having a preponderence of Negro pupils, and only 14 percent of teachers

> of the white race are in schools where Negroes are in the majority. The assignment of counsellors and coaches follows a similar pattern.
>
> "The existence in your district of a substantial duality in terms of race or color with respect to distribution of pupils in the various schools, is a matter of concern to us. The fact appears to be that of a total of 5,627 Negro high school pupils, approximately 85 percent are concentrated in 3 high schools in which the percentage of Negro attendence ranges from 92.3 percent to 100 percent. Similarly, 15,479 (approximately 85 percent) Negro elementary pupils attend 20 out of the 53 elementary schools in your district. It is noteworthy that in 17 of these 20 schools, Negroes constitute 90-100 percent of the total enrollment.
>
> "Our review also indicates that students at Roosevelt High School are not afforded the same educational opportunity as other students in your system."

On June 7, 1971, the Ohio State Department of Education presented a series of recommendations to the Dayton Board on how to achieve constitutionally required desegregation. In its letter conveying the recommendations, a State Department of Education report stated:

> "As the resolution of April 29, 1971 (of the Dayton Board), admitted, 'the Dayton Board of Education recognizes that unequal educational opportunities for minority students now exists.' Inequality of such opportunities, for minority *and* majority students, has characterized the Dayton public school system throughout its history.
>
> "Since the Board, *as an agency of state government*, has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative

duty to comply with the Constitution; that is, as the Supreme Court has stated, 'to eliminate from the public schools all vestiges of state-imposed segregation.'"

In particular, the State Department report was especially critical of the process of conversion to feeder and middle schools, stating that the following seemed to be occurring:

"1. two sets of schools will be totally black;

"2. racial isolation will actually be increased in one set of schools; and

"3. only in the Dayton View area, which was previously integrated, could conversion to middle schools possibly result in reduction of racial and economic isolation and insulation.

"If what appears to be happening with middle schools is in fact happening, then Dayton has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur."

Although the recommendations of the State Department were not complied with in full, the State Board of Education continued to aid in financing the operation of Dayton schools.

Finally, pursuant to the resolution of the Dayton Board passed at its April 29, 1971, meeting, the President of the Dayton Board appointed a broadly representative committee to evaluate and advise the Board on plans to reduce racial isolation and improve educational opportunities in Dayton. This committee became known as the Committee of 75, although its membership was later expanded to include eleven students. At its first meeting, on August 30, 1971, the Committee was charged as follows by the Board President:

"We recognize, and the statistical data substantiates, the fact that unequal educational opportunities for the poor and black students now exist in the Dayton School District. The Board of Education has gone on record by setting quality integrated education as its goal. We have admitted that the district is guilty of procedures which have led to the racial isolation of school children.

"It is this committee's responsibility to establish the evaluation elements to be applied to a developed plan or plans and advise the Dayton Board of Education accordingly. We do hope that you would set up guidelines and/or methods by which the community will become meaningfully involved.

"You are an arm of the Dayton Board of Education with the task of supplying input to the Board. It remains the responsibility of the Board of Education to make official approval of your point. We feel very strongly that the establishment of this committee is not an attempt to abdicate its responsibility or delegate its authority, but rather an attempt to utilize the enrichment of citizen participation. It is hoped that the school councils, and organized groups of school-oriented citizens of the school district, will be an avenue you may use for additional participation.

"If there be a fear that you are here to architect a master plan for 'busing' — 't'ain't true.' You are here in an attemp to supply your input of the ingredients for excellency to any plan that the administration and/or consultants may recommend. It is our sincere hope that when a plan is set for implementation, it should be that one or the one that embraces the wishes of the citizens of the Dayton School District and not one imposed by federal, state or court mandate."

After several months of study, the Committee of 75 issued its report in the late fall of 1971. The report recognized the

Dayton Board's casual responsibility for the condition of segregation and the imperative need to end one race schooling, and suggested the following tentative approaches to accomplish desegregation in the Dayton school system:

"1. Segregated education, because it perpetuates and condones economic and racial isolation, is both illegal and inferior.

"2. The school children of Dayton have suffered far too long under the crippling handicaps imposed by racial and economic isolation.

"3. We must resolve now as a total community to end inferior segregated education once and for all.

"4. Time is running out. Unless we act now the divisions generated by segregation will destroy us. Unless we act now court orders may impose upon us what all of us will regret.

"5. Initiative in the struggle against segregated education belongs to the Dayton Board of Education. We cannot wait for housing and job patterns to change while we defy the law of the land.

"6. To lift the plague of segregated education in Dayton immediate appeal must be addressed to the school systems surrounding Dayton as well as to the appropriate state and national agencies involved.

"7. Desegregation is not enough. To end racial and economic isolation we must not rest until we have achieved true integration, until the differing ethnic and racial groups among us are able to live side by side in mutual respect.

"8. The personal cost of achieving such true integration will be high because to achieve such integration we must persist in dialogue until the differences that divide us have been resolved. We can no longer allow the fear of busing (to) stifle such dialogue.

"9. The financial cost of true integration will also be high. At least 1 per cent of the current budget, exclusive of federal and state grants, should be allocated to this sector.

"10. Integrated quality education requires constant vigilance. We must not only develop support systems to undergird every group involved in the changes proposed but we must nurture these groups by continuing attention to curricula, buildings, and in-service training."

The report of the Committee of 75 concluded as follows:

"*Summary.* The presence and magnitude of the problem before us needs to be recognized by all the citizens of Dayton. Quality integrated education can help stop the flight to the suburbs, break the cycle of poor education, and the lack of job skills which handicap the minorities. The cost of this type of education will be small in relation to the total benefits society will reap."

Thereafter, at its regular meeting on December 8, 1971, the Dayton Board of Education passed three resolutions in response to the report of the Committee of 75. The first resolution provided, in part, as follows:

"WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

"NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

"1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design

of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions or inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

"2. That this Board recognizes that past actions or inactions of the Board of Education and residential racial segregation are interdependent phenomena.

"3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

"4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society."

The second resolution passed by the Dayton Board at its December 8, 1971, meeting requested the assistance of the state and federal governments in desegregating Dayton public schools. The third resolution declared the Board policy to be that each school in the system should enroll pupils in a manner

which substantially reflected the racial and economic characteristics of the district as a whole and directed the school superintendent to implement a plan of desegregation according to the following guidelines:

"a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

"b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

"c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

"d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

"e. Desegregation is to be completed by September, 1972.

"f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criteria in c. above.

"g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy."

Each of the three Board resolutions passed by a 5 to 2 vote after a motion to table the resolution had failed by a 4 to 3 vote.

Subsequently, on January 3, 1972, the newly constituted Dayton Board, the composition of which had been changed by the local elections of November 1971, officially rescinded the three resolutions passed by the prior Board at its December 8, 1971 meeting. The rescission of the three resolutions occurred by votes, respectively, of 4 to 3, 4 to 2, and 4 to 2. The effect of the rescissions was to reinstate the existing attendance zones and the system's Freedom of Enrollment program for

the 1972-73 school year. The present action was filed on April 17, 1972.

III. The Constitutional Violations Found by the District Court

The District Court found three constitutional violations in the Dayton school system, namely, (A) racially imbalanced schools, (B) optional attendance zones, and (C) the Dayton Board's rescission of the three resolutions. These were held by the District Court to be "cumulatively in violation of the Equal Protection Clause." Further, the District Court stated that the rescission of the resolutions "constituted an independent violation" of the constitutional rights of the black minority in Dayton.

We hold that the findings of fact on which the District Court based its conclusion of a cumulative violation are not clearly erroneous but, to the contrary, are amply supported by the evidence. Fed. R. Civ. P. 52(a). However, we do not pass upon the question at the present time as to whether the rescission of the Board resolutions in and of itself constituted an independent violation of the Constitution.

(A) Racially Imbalanced Schools

The District Judge made the following finding of fact:

> "The great majority of all schools in the Dayton system today have student populations which are racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census. Except at the Patterson Co-op High School, where in the past few years a concerted effort has been made to enroll more black students, no effort has been made by the school board of Dayton to balance by race the student population at any particular school." (Footnote omitted.)

With respect to this finding of fact, the District Judge appended the following chart which graphically demonstrates the racial imbalance in Dayton's sixty-eight public schools.

RACIAL COMPOSITION OF DAYTON PUBLIC SCHOOLS (1971-1972)

Elementary schools — % Black:

1.	Jane Addams	81.7	27.	Jackson Primary	98.8
2.	Allen	0.6	28.	Jefferson Ele.	60.1
3.	Belle Haven	5.0	29.	Jefferson Primary	57.1
4.	Belmont	0.8	30.	Kemp	0.0
5.	Brown	0.6	31.	Lewton	0.0
6.	Carlson	99.0	32.	Lincoln	0.0
7.	Cleveland	0.0	33.	Loos	4.6
8.	Drexel	5.7	34.	Horace Mann	0.2
9.	Eastmont	0.0	35.	McGuffey	14.4
10.	Edison	97.3	36.	McNary Park	99.4
11.	Emerson	6.8	37.	Meadowdale Ele.	8.0
12.	Fairport	0.1	38.	Miami Chapel	99.9
13.	Fairview Ele.	1.7	39.	Patterson-Kennedy	0.0
14.	Ft. McKinley	0.0	40.	Residence Park Ele.	98.8
15.	Franklin	0.0	41.	Residence Park Pri.	99.3
16.	Gardendale	28.5	42.	Ruskin	7.0
17.	Gettysburg	5.2	43.	Shiloh	0.1
18.	Gorman	21.1	44.	Shoup Mill	7.1
19.	U.S. Grant	0.1	45.	Louise Troy	100.0
20.	Grace A. Greene	96.8	46.	Valerie	7.5
21.	Hawthorne	0.0	47.	Van Cleve	1.1
22.	Hickorydale	6.6	48.	Washington	19.4
23.	Highview	97.0	49.	Weaver	99.9
24.	Huffman	0.0	50.	Webster	0.0
25.	Irving	99.0	51.	Westwood	99.4
26.	Jackson Ele.	99.1	52.	Wogaman	100.0

Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.1% black.

Middle Schools – % Black:

1.	MacFarlane	99.6
2.	Whittier	99.3
3.	Cornell Heights ...	80.5
4.	Longfellow	64.1
5.	Orville Wright	8.1

High Schools – % Black:

1.	Dunbar	100.0
2.	Roosevelt	100.0
3.	Roth	95.8
4.	Colonel White	54.6
5.	Patterson Co-op ..	32.9
6.	Fairview	24.1
7.	Stivers	14.0
8.	Meadowdale	10.6
9.	Kiser	9.8
10.	Wilbur Wright	9.2
11.	Belmont	5.2

Enrollment data from the Dayton system reveals the substantial lack of progress that has been made over the past 23 years in integrating the Dayton school system. In 1951-52, of 47 schools, 38 had student enrollments 90 percent or more one race (4 black, 34 white). Of the 35,000 pupils in the district, 19 per cent were black. Yet over half of all black pupils were enrolled in the four *all* black schools; and 77.6 per cent of all pupils were assigned to virtual one race schools. "Virtual one race schools" refers to schools with student enrollments 90 per cent or more one race. In 1963-64, of 64 schools, 57 had student enrollments 90 per cent or more one race (13 black, 44 white). Of the 57,400 pupils in the district, 27.8 per cent were black. Yet 79.2 per cent of all black pupils were enrolled in the 13 black schools; and 88.8 per cent of all pupils were enrolled in such one race schools.

In 1971-72 (the year the complaint was filed), of 69 schools, 49 had student enrollments 90 per cent or more one race (21 black, 28 white). Of the 54,000 pupils, 42.7 per cent were black; and 75.9 per cent of all black students were assigned to the 21 black schools. In 1972-73 (the year the hearing was held) of 68 schools, 47 were virtually one race (22 black, 25 white); fully 80 per cent of all classrooms were virtually one race. (Of the 50,000 pupils in the district, 44.6 per cent were black).

Every school which was 90 per cent or more black in 1951-52 *or* 1963-64 *or* 1971-72 and which is still in use today remains 90 per cent or more black. Of the 25 white schools in 1972-73, *all* opened 90 per cent or more white and, if open, were 90 per cent or more white in 1971-72, 1963-64 and 1951-52.

(B) Optional Attendance Zones

The District Judge made the following finding of fact:

> "(11) The Board of Education of the Dayton School District has from time to time created optional zones. Optional zones are dual or overlapping attendance areas which allow children residing within them a choice among two or more schools. Some optional attendance zones were created where the more distant school geographically had better access; some were created where the more distant school did not require the crossing of busy intersections, commercial areas, or railroad tracks. Many were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations. Seven optional elementary zones and four optional high school zones exist at the present time. All of the others have been abolished.
>
> "The majority of optional zones had no racial significance at the time of their creation. The Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth

zones may have constituted exceptions to this general rule and we cannot conclude that these did not have adverse racial effects. Similarly, although none of the elementary school optional zones today have any significant potential effects in terms of increased racial separation, the same cannot be said of the high school optional zones. Two of these zones, those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past."

The testimony of Dr. Gordon Foster, Director of the Florida School Desegregation Consulting Center at the University of Miami, indicates that the Colonel White-Roosevelt optional attendance area is almost a classic example of segregation practice:

"Q Dr. Foster, with reference, first of all, to the option attendance zones, you described certain effects.

Are there short term as well as long term effects of the ultilization of optional attendance zones?

"A Yes. In the ones we talked about at the high school level, if we can cite the Roosevelt-Colonel White optional zone, and the following Colonel White-Kiser optional zone, the short term effect it seems to me is to allow whites to move out of a school assignment that is becoming black, and I should point out that this is not to say that in many cases that at a certain point blacks also take advantage of this option.

"In the Colonel White-Kiser situation, for example, as Colonel White has become blacker, we are at the point where there are no whites apparently opting now to go to Colonel White."

Further testimony of Dr. Foster demonstrates the deleterious effect that the optional attendance zones had on school integration in Dayton:

"Q In what way do optional attendance areas affect desegregation and the stability of pupil assignment to particular schools?

"A. Well, essentially in my opinion they create instability in the public in one way in terms of housing choices where there are choices and in terms of perception of whether a school is going black or staying white, this sort of thing, so that generally where you have an optional zone which has racial implications, you have an unstable situation that everybody realizes is in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation.

"Q. The optional attendance zones which you have identified in your testimony today, what is your opinion with respect to the effect or if there is any effect on racial composition of schools in Dayton?

"A. Well, in my opinion, these accelerated and precipitated further segregation, and in those cases where I was able to cite hard figures, I think that is very definitely borne out, and I have no reason to believe that in all the other cases the same thing was true although I can't cite actual pupil figures from year to year because they simply aren't available."

We conclude that the District Court correctly found that the optional attendance zones used in Dayton were an element of the cumulative violation of the constitutional rights of the appellants.

(C) Rescission of the Board's Resolutions

The District Judge rendered the following as a finding of fact:

"At the general election in November, 1971, the electors of the school district of Dayton elected three members for a four year term commencing January 1, 1972. Issues

at such election involved the matter of school attendance zones and transportation of pupils. Two incumbent members of the Board ran for reelection, one did not. One incumbent was relected and two new members of the Board were added. On December 8, 1971, the 1971 Board met to consider resolutions dealing with transportation of students and zone attendance lines. All members present were duly elected, qualified and acting members of the Board, although two of them were so-called 'lame ducks,' who would not be members of the Board after December 31, 1971.

"The Board adopted several resolutions. These resolutions recognized the existence of racial segregation in the Dayton schools, the role played by the Board in the creation of the racial patterns and the concommitant responsibility of the Board to eradicate these patterns through affirmative action. The types of affirmative action recognized included the elimination of the old attendance zones and the transportation of students for the purpose of achieving the city-wide racial balance of students. . . .

"Immediately thereafter, one member of the Board who had voted with the majority, requested reconsideration and was improperly ruled out of order. The Board met subsequently on December 6, 1971 [sic], and January 3, 1972. At the end of the latter meeting, the Board ended its term of office and the 1972 Board took its place. On January 3, at its first meeting, the 1972 Board rescinded the resolutions passed on December 8. Since the 1971 Board had passed out of existence, the action of the 1972 Board on January 3, 1972, was not in the nature of a reconsideration but instead was a rescission of the previous action."

From this finding of fact, the District Judge concluded:

"The right of the majority to override protected minority rights has clear limitations in our constitutional democracy. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); also see *Alkire* v. *Cashman*, — F.Supp. — (S.D. Ohio E.D. 1972). The rescission in early 1972 of the resolutions adopted by the 1971 School Board constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton. See *Bradley* v. *Milliken*, 433 F.2d 897 (C.A. 6 1970); *Oliver* v. *Kalamazoo Board of Education*, 346 F.Supp. 766 (W.D. Mich. S.D. 1971), *aff'd.* 448 F.2d 635 (C.A. 6 1971)."

The passage of the three resolutions and their subsequent rescission by a Board of a different composition are factual matters about which there is no dispute. As hereinbefore stated, the record amply supports the District Judge's findings that racially imbalanced schools and optional attendance zones were elements of the cumulative violation of the appellants' constitutional rights. Accordingly, when the Dayton Board at its December 8, 1971, meeting passed resolutions designed, among other things, to eliminate racial imbalance and optional attendance zones in Dayton schools, it was acting in a manner consistent with its constitutional duties. Therefore, the rescission by a subsequent Board of these resolutions designed to carry out the Board's constitutional duties was an element of the cumulative violation of the appellants' constitutional rights as guaranteed by the Equal Protection Clause of the Constitution.

The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf. *Hunter* v. *Erickson*, 393 U.S. 385 (1960); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution.

In view of our conclusion in this case that the rescission was a part of the cumulative violation of appellants' constitutional rights, we find it unnecessary to pass on the question of whether the rescission by itself was a violation of those rights.

We affirm the District Court's holding that racially imbalanced schools, optional attendance zones, and the Board's rescission of the three resolutions are cumulatively in violation of appellants' rights guaranteed by the Equal Protection Clause.

IV. Other Alleged Constitutional Violations

On appeal, the appellants raise at least four other school practices which purportedly maintained and expanded the basically dual school system inherited at the time of *Brown*. These practices are in the areas of (A) staff assignment, (B) school construction, (C) grade structure and reorganization, and (D) transfers and transportation. The District Judge did not include any of these practices within his finding of cumulative violation of the appellants' constitutional rights.

(A) Staff Assignment

The record reveals that prior to the 1951-52 school year the Dayton Board basically assigned all black teachers only to schools with all black pupils and all white teachers to schools with predominantly white student bodies pursuant to an explicit segregation policy of the Board. In 1951-52, the Board introduced a new policy ostensibly to integrate the faculties, but which effectively continued in practice the racial assignment of faculty through the 1970-71 school year.

In a letter dated March 17, 1969, the Acting Director of the Office of Civil Rights of HEW notified the Dayton Board that "an analysis of the data obtained during the (compliance) review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff."

Other relevant portions of this letter are contained in Section II of this opinion. Following receipt of the letter, the Dayton Board negotiated with HEW and agreed to desegregate its staff so "that each school staff throughout the district will have a racial composition that reflects the total staff of the district as a whole" in accordance with the principles of *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). Thereafter, the Dayton Board realigned its school staffs for the 1970-71 school year.

The appellants admit that progress has been made with respect to eliminating segregative staff assignment, but allege that the agreement with HEW has not been fulfilled in that vestiges of the former practices persist which continue to identify schools as "black schools" or "white schools." As an example, at the high school level, the following table was presented by the appellants to demonstrate how Board assignment of its professional staff still served to identify schools as "black schools" or "white schools" in 1971-72 (w means white, b means black):

	Pupil % Black	*Faculty % Black*	*Principal*	*Coaches*
Belmont	5.2	23.1	w	10w, 2b
Wilbur Wright	9.2	28.5	w	10w, 3b
Kiser	9.8	20.1	w	10w, 2b
Meadowdale	10.6	23.5	w	13w, 3b
Stivers	14.0	32.4	w	10w, 4b
Fairview	24.1	29.8	w	10w, 5b
Col. White	54.6	32.0	w	9w, 6b
Roth	95.8	43.5	b	9w, 7b
Roosevelt	100.0	47.4	b	8w, 8b
Dunbar	100.0	50.3	b	7w, 9b

The witness Dr. Robert L. Green, Dean of the Urban College and Professor of Educational Psychology at Michigan State University, testified as follows:

"Q. Dr. Green, I believe I informed you that the faculties were desegregated as a result of HEW action in 1970.

"Do you have an opinion as to whether or not the effects of this history of faculty assignment persist in terms of identification of schools as black or white in the school district after the changing of the faculties as was done in this case?

"MR. GREER: Objection, your Honor.

"THE COURT: Overruled.

"A. Yes. The answer is yes, Mr. Lucas. When there has been historical practice of placing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentially uni-racial or predominantly black or predominantly white.

"Q. Dr. Green, you did examine the '68-'69 statistics for the Dayton School System, is that correct?

"A. Yes.

"Q. And did you in examining the data note any correlation between the pupil composition of black or white and the faculty composition black or white?

"A. Yes, I did, Mr. Lucas.

"Q. Do you have an opinion whether this is isolated instances of correlation or is there any systematic pattern to it?

"A. There seems to be a systematic pattern as it relates to black teachers and the racial composition of schools vis-a-vis black youngsters and white youngsters being essentially placed in schools that are predominantly white."

The witness Dr. Foster testified as follows:

"Q. . . . In light of that history, could you give us your opinion as to the effect, first of all, of that policy before the change, in terms of identification of schools as black or white and the effects of that change on the present situation in the Dayton School System?

"MR. GREER: Objection.

"THE COURT: Overruled.

"A. Well, my opinion is that this policy and practice before the change we assume took place, especially since it is in a northern district, would indicate that the Board is missing or has missed a golden opportunity to prove that it does want to run a unitary system and remove segregation practices insofar as it is able, because the Board clearly, as I understand it, under most State laws, or all State laws, can assign teachers willy-nilly in the System wherever they want to. This is not a free choice matter.

"Q. Is it also an annual option that the school Board has?

"A. Yes, in terms of assignment. In terms of my opinion on what this does, as recently changed, assuming this, I would have to say that this does not remove by any means the vestages of a segregated system since it is only one component of several important aspects of a system segregated or desegregated. I think it is a very important component, and I think it is a step certainly in the direction of desegregation, and a very positive step.

"But coupled with the other most important step of pupil assignment, so long as the schools themselves remain segregated, as they certainly do at this time in my opinion in Dayton, then the fact that teachers or staff being desegregated, if we assume that doesn't carry near the weight it would if the total desegregation process had taken place."

Dr. Wayne M. Carle, Superintendent of Schools in Dayton at the time of the trial, testified as follows:

"BY MR. LUCAS:

"Q. Would you answer my preliminary question, then. Did you agree with the HEW conclusion that there was purposeful faculty and staff segregation in the Dayton School System?

"MR. GREER: We would object to this, your Honor, as it simply asks a self-serving conclusion of the witness.

"THE COURT: I am going to overrule your objection. You may answer.

"A. There is no question but what that was so.

BY MR. LUCAS:

"Q. Now, Doctor, I think you stated that there had been substantial faculty desegregation. Has there also been staff desegregation and, if you will, limit it to what you have defined as line personnel, principals, assistant principals?

"A. There has been considerable desegregation of administrative staff, but there still is a high correlation between the race of pupils and the race of the administrator.

• • •

"Now, today the percentage of black administrators is around 32 or 33 percent, as I recall. That indicates less discrimination in promotion, since there is more relationship between the percentage of teachers, which now is perhaps 34 or 35 percent, and administrators. But I am saying that with respect to their assignment, and particularly at the high school level, there is an almost perfect correlation between the race of the principal and the predominating race in the school. All four black high schools, for example, have black principals. All the other high schools have white principals. So that that considerable vestige of segregation still has not been eliminated. There would be other instances, if you just scan the statistics, in which previously all black or nearly black staff similarly have weighted errors in them, that

is, the error is still in the direction of the previous discrimination. If the staff previously were 70 percent and now should be, let's say, 30 percent black, it may still be 40 percent because of difficult factors in resolving it.

"In all cases, or probably in all cases, that error or that difference is still weighted to the previously fully segregated pattern, so that it is very difficult I think, to understand the depth of segregation. It is so pervasive that its vestiges are difficult. These are two areas in which that is very obvious."

(B) School Construction

The District Judge did not include the Dayton Board's school construction practices within the cumulative violation because he found the underlying motives behind such construction to be racially neutral, rendering the following as a finding of fact:

"(c) Site selection and construction

"(9) Since 1954 the school board of Dayton has constructed 14 new elementary schools and 69 elementary school additions. The construction follows the pattern of growth in the Dayton area and follows the specific policy of 'building schools where children are, or where they are expected to be.' New construction of elementary schools are largely on the periphery of the center city. There are instances of errors in Board planning in that some areas have not developed as expected and other developed areas have not become part of the Dayton School District, as expected. There are examples of schools operating substantially below capacity. While reasonable minds might reasonably differ on selection and construction of some schools, sufficient evidence has not been presented that school construction was segregative in nature other than to provide schools in white neighborhoods which remain predominately white and schools in black neighborhoods which remain predominately black.

"(10) Five new high schools and fourteen high school additions have been constructed in the past eighteen years. Construction of some high schools followed the pattern of construction of elementary schools in that sites selected were away from the center of the city and in neighborhoods which were predominately white. Other sites could have been selected near the center of the city in black neighborhoods. Such schools would arguably, at least, have had a larger proportion of whites attending such schools.

"Site selection is a matter of judgment and no evidence has been presented that the Board of Education failed to use neutral criteria in its choices. In the construction of schools, the Board, over the years, has been presented with options. Plaintiffs have failed to sustain their burden of showing that the defendant Board exercised those options presented in an improper fashion."

On appeal, the appellants contend that there is substantial evidence in the record to support their claim that the Dayton Board's practices in school construction had a segregative effect and contributed substantially to the alleged present duality in pupil assignment. The record reveals that in the period of greatest expansion of the Dayton school system, from the late 1940's to the mid 1960's, the great majority of new schools and additions were located by the Board in either virtually all black or all white areas. Of 24 new schools constructed between 1950 and the present, 22 opened 90 per cent or more black or white. The following table contains some examples:

High Schools	*Date of Opening*	*% Black at Opening*	*% Black Pupils 1972-1973*
Patterson	1954	0.0	32.9
Belmont	1956	0.0	5.2
Meadowdale	1960	0.0	10.6
Dunbar	1962	92.3	100.0

Elementary Schools			
Orville Wright	1952	0.0	8.1
Miami Chapel	1953	100.0	99.8
Horace Mann	1954	0.0	3.1
Bell Haven	1954	0.0	17.1
Hickorydale	1957	0.0	32.5
Meadowdale Elem.	1957	0.0	12.6
Louise Troy (Primary)	1957	100.0	99.1
Shoup Mill	1958	0.0	3.8
Carlson	1958	95.0	99.0
Jackson Primary	1960	99.9	99.7
McNary Park (Primary)	1964	100.0	100.0
Res. Park (Primary)	1966	96.5	100.0
Valerie	1966	0.0	24.0

On the issue of school construction practices, Dr. Foster testified as follows:

"Q. Dr. Foster, would you at this point tell me if you made an inquiry into the question which I think related to the construction issues of site selection?

"A. Yes.

"Q. And what was that inquiry?

"A. In terms of the use of site selections to maintain segregation, in the new construction sites from 1950 which we have already discussed to the present, many of these have helped to promote and to impact and lock in segregated or isolated situations either in the inner city or in the suburbs, and I think this is true in terms of both school segregation and housing segregation, that is, in terms of its effects. First of all, in the area of the white suburban expansions which are farthest from the center of the city which is all black, and these were, of course, more inaccessible at the time of construction than they are now. We have Valerie which was built in 1966 which is almost at the extreme north of the district. We have Meadowdale High School built in 1960 and Meadowdale Elementary built in 1957 to the north of

the district. We have Shoup Mill built in 1958 and to the nearly extreme north. The south and east of the furthest white suburban expansion, we have Eastmont, on the extreme east built in 1965. We have Wilbur Wright to the northeast built in 1952, Horace Mann to the southeast built in 1954, and Belmont High School in the southeast built in 1956.

"Now, contrary-wise, in the inner city during this time there were a couple of examples of schools which were built into locked-in situations in terms of segregation, and in fact these schools were surrounded by other schools which were all black. That would be McNary in 1964 and Jackson Primary in 1960.

"Q. Dr. Foster, in your experience, use of the primary unit in close proximity to elementary schools, has this been a matter reflective of segregation practices in your experience?

"A. Yes. It is in a sense very much nothing more than an addition. They are on the same campus and for all practical purposes they are really one school.

"Q. What effect does this have on the existing racial concentrations?

"A. Well, it tends to secure it and to further insure that those schools are going to remain segregated and that the system as a whole is going to remain segregated."

Based on this evidence, the appellants dispute the District Court's conclusion that the Dayton Board's school construction practices were not a part of the cumulative violation. The appellants contend that on facts similar to those presented in this case the Supreme Court in *Swann, supra*, 402 U.S. at 20-21, found major constitutional violations on which a District Court could fashion a remedy.

(C) Grade Structure and Reorganization

The appellants' primary objection in this area is to the establishment of a middle school system in the 1971-72 school

year which allegedly had a segregative effect. Dr. Foster testified as follows:

> "My conclusion is that the establishment of the middle schools in 1971 resulted in the establishment of four out of five schools that were clearly racially identifiable, therefore, increasing or maintaining segregation as opposed to availing the opportunity of decreasing it."

Further, after the establishment of the new middle school structure, the Ohio State Department of Education gave the following advice to Dayton school authorities:

> "If what appears to be happening with middle schools is in fact happening, then Dayton has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to school children. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur."

The District Court found that the boundaries established for the middle schools in September 1971 had "neither segregative nor integrative effect." The appellants submit that this finding means, under applicable legal standards, that the Board acted unconstitutionally to maintain segregation in the face of an opportunity to accomplish substantial desegregation. The appellants assert that the action of the Dayton Board was intentional because the Board was aware of desegregation alternatives but instead choose a plan whose predictable impact was not to further integrate the Dayton school system.

(D) Transfers and Transportation

Finally, the appellants contend that transfer and transportation practices of the Dayton Board, which might have held promise to accomplish further desegregation, have operated to maintain segregation and further earmark schools as "black"

or "white." In support of this contention, the appellants cite evidence that curriculum, hardship and disciplinary transfers have operated frequently to assign white children from "black schools" to "whiter schools" and black children from "white schools" to "blacker schools." Further, there is evidence in the record revealing that the Board assigned tuition pupils from outside the district on a dual basis; white pupils were assigned to white schools and black pupils were assigned to black schools.

The testimony of John Harewood, Assistant Superintendent of Dayton schools in charge of administration, reveals two instances in which children were bused "intact" with the effect of segregating children on a racial basis in separate classrooms within schools. In 1963, white children from Ruskin School were transported intact to separate classes in the mixed Central School. In the spring of 1968, some of the black children from Edison School, which had been partially destroyed by fire, were similarly segregated within a number of white schools throughout the city.

The District Court's only conclusion in the area of transfer and transportation practices was with regard to the school system's Freedom of Enrollment program. The District Court required that program be revised for Dayton high schools so that transfers for purpose of improving racial balance take precedence over curriculum transfers.

On the basis of the evidence adduced, the appellants' legal argument in this area is that the transfer and transportation practices of the Dayton Board had the "clear effect of earmarking schools according to their racial composition" which is proscribed by *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 202 (1973).

(E) Conclusion as to Other Alleged Constitutional Violations

As hereinabove indicated in Section IV of this opinion, the appellants have raised serious questions with respect to wheth-

er the District Judge's failure to include these four school practices within the cumulative violation was supported by substantial evidence. In view of our holding in Section V hereof, we conclude that it is unnecessary at this stage to pass on whether the District Judge's findings of fact with respect to these four school practices is supported by substantial evidence.

V. Remedy

As more fully described in Section I hereof, the District Court ordered the Dayton Board of Education to submit a desegregation plan that conformed to all requirements of law. Subsequently, the four-member majority of the Dayton Board submitted an eleven point plan characterized by the appellants as a "free choice plan." Other plans were submitted to the District Court by the three-member minority of the Dayton Board and Dayton Classroom Teachers' Association. Without holding a hearing on the remedy issue, the District Court approved the plan of the Dayton Board majority with one modification.

The appellants' primary contention on appeal is that the desegregation plan approved by the District Court is inadequate to remedy the cumulative violation found by the District Court. We agree.

On receipt of the Board majority plan, the District Court was obliged "to assess the effectiveness of . . . [the] proposed plan in achieving desegregation . . . . in light of the circumstances present and the options available in each instance." *Green* v. *County School Board*, 391 U.S. 430, 439 (1968). The appellants assert that the circumstances present here, namely a cumulative violation, required a remedy of "all-out desegregation." *Keyes, supra*, 413 U.S. at 214. The appellants further assert that the plan of the Board minority would accomplish such "all-out desegregation" and that therefore we should remand this case to the District Court with instructions that it order the plan of the Board minority implemented.

Today we simply hold that the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations. The case is remanded to the District Court for proceedings to formulate a desegregation plan for the Dayton school system consistent with the remedial guidelines outlined in *Keyes, supra,* and *Swann, supra.* This holding does not necessarily require the District Court to implement the plan of the Board minority, but "all vestiges of state-imposed segregation," *Swann, supra,* 402 U.S. at 15, must be eliminated.

In formulating a desgregation plan, the District Court of course will adhere also to the guidelines enunciated by the Supreme Court in *Milliken* v. *Bradley,* — U.S. — (No. 73-434, July 26, 1974), reversing *Bradley* v. *Milliken,* 484 F. 2d 215 (6th Cir. *in banc* 1973).

Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Keyes, supra,* 413 U.S. at 200. When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate. *Id.* at 210-13.

VI. Other Directions on Remand

In its Supplemental Order on Remedy, dated July 13, 1973, the District Court suggested that its disposition of the case appeared "to require the dismissal of those non-Dayton defendants." We disagree with this suggestion as to the State defendants.

The District Court is directed to keep the State defendants as parties to this action. Although, according to the District Court order of procedure, evidence as to a state violation was supposed to be excluded from the initial trial, the following evidence was adduced: The Dayton school district is chartered by the Ohio State Department of Education, and without such a charter, the district would be without power to operate and could not receive state aid. Ohio Revised Code, §§ 3301.16 and 3317.01. Since an Ohio Attorney General's opinion dated July 9, 1956, the State Department of Education has known that it has an affirmative duty under both Ohio and federal law to take all actions necessary, including, but not limited to, the withholding of state and federal funds, to prevent and eliminate racial segregation in the public schools. Finally, during the years in question in this case, the Dayton school district was denied any allocation of state funds for pupil transportation, although such funds were made available to most suburban and rural school districts in the state.

VII. Other Issues

Several other issues were presented which do not now require discussion. All contentions of the parties contrary to the conclusions reached in this opinion have been carefully considered and are found to be without merit.

VIII. Conclusion

The District Court's holding of a cumulative violation of the appellants' constitutional rights, as contained in its Findings of Fact and Memorandum Opinion of Law dated February 7, 1973, is affirmed.

Since we conclude that the remedy prescribed by the District Court is inadequate, the case is remanded to the District Court with directions to revise and supplement its order of July 13, 1973, entitled "Supplemental Order on Remedy," so as to formulate, in accordance with the guidelines hereinabove set forth, a desegregation plan for the Dayton school system and for other proceedings to that end not inconsistent with this opinion.

D. DISTRICT COURT'S JANUARY 7, 1975 ORDER RELATING TO SUBMISSION OF PLAN.

(Filed January 7, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

ORDER

This matter comes before the Court pursuant to remand by the United States Court of Appeals for the Sixth Circuit and following informal conferences called by the Court limited to one attorney for the plaintiffs and one attorney for the defendants. The Court would be remiss if it did not recognize the contributions of plaintiffs' attorney, Louis Lucas, and defendants' attorney, David Greer, whose research, counsel and suggestions materially assisted the Court in the preliminary phase of this matter.

Based upon such conferences, the controlling decisions in this Circuit, and the state of the law on the subject as announced by the Supreme Court of the United States, the Court concludes that it is now appropriate to deal with

specific plans. The parties, including the plaintiffs, the defendant Board of Education of Dayton, and the Board of Education for the State of Ohio will confer and prepare plans either jointly or separately for submission to this Court which will accomplish the following ends and satisfy the requirements set forth in the opinion of the United States Court of Appeals for the Sixth Circuit, 503 F.2d 684 (1974).

In the twenty years that have elapsed since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), large numbers of American cities have faced the problem that now confronts Dayton and have adopted varying methods to solve it. Able, conscientious, and knowledgeable experts in this field have developed. Departments of government, both state and national, are anxious to assist. The experience of other cities and the available experts should be consulted by the parties in the ultimate solution of this problem. Such devices as "pairing" of schools, "clustering" of schools, alterations of attendance boundaries, "magnet" schools, feeder patterns, increasing school capacity, new construction and voluntary transfers, should all be considered. No known desegregation device should be overlooked. The proposals of the Board of Education, both those presented in response to this Court's Order of February, 1973, and those suggested in the informal discussions above referred to should not be abandoned. The thought and planning that preceded these proposals should not be ignored. These proposals have not been considered unresponsive; they have been considered insufficient. They do represent a base for further expansion.

The Court draws particular attention to the proposal of the Dayton School Board to construct magnet schools in the downtown area. It may well be that further development of this concept might achieve the desired goals as to high schools on a voluntary basis.

The Dayton freedom of enrollment program should not be abandoned. It, too, may contribute in great measure to a solution of the problem.

Deliberately absent from the foregoing suggestions is that of transporting students to accomplish racial balance. It does

not require much wisdom or foresight to recognize that this coercive solution is the least satisfactory. The Court will consider transportation of students only as a last resort and only after careful inquiry has established that no other solution exists.

One word of admonition: This is not a problem that will disappear by itself. It is concerned with basic constitutional rights that every public official, including this Court, is sworn to uphold.

In February of 1973, this Court observed that no peaceful community could long exist where two separate societies viewed each other from ever higher walls of suspicion and distrust. The tragic events of the past three months in the city of Boston, Massachusetts, have confirmed this observation with distressing consequences.

With full respect for the Board's knowledge and ability; with full recognition of its representative responsibilities; and with full faith in its dedication and good will, the Court now requests the Board of Education to report upon the months of study and planning that have been completed as they relate to a solution of the problem herein.

The Board of Education will submit its plan to the Court on or before February 1, 1975. A completed plan will be made available for public inspection on or before January 20, 1975. Should it appear necessary, hearings on such plan and any other submitted by interested parties will be held on or before February 15, 1975.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

E. DISTRICT COURT'S MARCH 10, 1975 ORDER ADOPTING PLAN OF DAYTON BOARD OF EDUCATION.

(Filed March 10, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

ORDER

This matter is before the Court pursuant to remand by the United States Court of Appeals for the Sixth Circuit. In accordance therewith this Court on January 7, 1975, directed the School Board of the City of Dayton to submit a plan of desegregation by February 1, 1975 consistent with such Order of Remand. Subsequently, plaintiffs also filed a plan and a hearing on both was held February 17, 19, and 20, 1975.

I. Basis of Court's Consideration

In order to place this Court's consideration of any remedial plan in a proper context certain introductory observations should be made:

1. All desegregation efforts must be tested initially against the principle that separate facilities limited to blacks and whites are forbidden;[1]

2. Racial balance, i.e., a reflection of the district percentages in each school is not a Constitutional right equivalent to the principle above enunciated;[2]

3. It is not the function of district courts to operate public school systems, to determine social values, or to engage in restructuring of communities, personal attitudes, or sociological benefits, except as these matters may bear upon Constitutional rights.[3]

To the foregoing the court would add the following which

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[1] "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"; Brown v. Board of Education, 347 U.S. 483 (1954) (Brown 1).

[2] *Swann v. Board of Education*, 402 U.S. at page 24:

"If we were to read the holding of the District Judge to require as a matter of substantive Constitutional rights any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

See also: Milliken v. Bradley, —— U.S. —— (1974), 94 S.Ct. 3112 at p. 3125.

"The failure of an educational agency to attain a balance on the basis of race, color, or sex or national origin of students among its schools shall not constitute a denial of equal educational opportunity or equal protection of laws." 20 U.S.C. § 1704.

[3] "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a Constitutional violation, however, that would not be within the authority of a federal court." Swann v. Board of Education, supra.

may be deemed findings of fact whether implicit in or explicated by previous opinions of this Court.

1. The State of Ohio does not now, nor has it since 1887 mandated a dual system of public education. To the contrary, 84 Ohio Law 34, dated February 22, 1887, specifically required a unitary public school system.

2. The defendant School Board of the City of Dayton had engaged in activities which were segregative in effect and which did impinge upon the Constitutional rights of students in such system. At no time, however, did defendant maintain a dual system of education.

3. Overt evidences of such segregative activities have been eliminated both by action of the Board of Education and by previous Order of this Court but the effect thereof may not.

II. Duty of District Courts

With the determination that acts of segregation did occur it is now necessary to examine the duty imposed upon this Court under such circumstances. While there is a variation in the description of such duty, this Court elects to be guided in this matter by the following: "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education*, (Brown II), 349 U.S. 294.

There is, however, a final admonition in *Swann* that bears careful attention: "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Board of Education, supra* at p. 16.[4]

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[4] A subsequent determination by the Supreme Court of the United States in *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) holds there is broad discretionary power granted to trial courts in shaping equity decrees. Lemon, it should be pointed out, is not a school desegregation case.

Two events that bear upon the scope of appropriate remedy have occurred since August 20, 1974, the date of the appellate holding in this case. These events may well have changed both "the nature of the violation" and the "scope of the remedy." They require further discussion.

First: Effective October 20, 1974, the Congress of the United States adopted the Equal Educational Opportunities Act, 20 U.S.C. § 1701 *et seq.*[5]

Section 1701 declares it to be the policy of the United States that:

"1. All children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

2. The neighborhood is the appropriate basis for determining public school assignment."

Section 1712 imposes a limitation upon courts in the following language: "In formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct *particular denials of equal educational opportunity or equal protection of the laws.* [Emphasis added]

In § 1713 is listed a priority of remedies and in § 1714 there is a specific limitation which holds: "No court . . . shall pursuant to § 1713 of this Title order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such students."

Second: On December 6, 1974, the United States Court of Appeals for the Sixth Circuit decided *George and Carolyn Higgins* v. *Board of Education of the City of Grand Rapids,* (No. 73-2189), — F.2d — (1974). The Court in *Higgins*

[5] The effective date of the above act is said to be, "On and after the sixtieth day after August 21, 1974."

followed *Deal* v. *City of Cincinnati Board of Education,* 369 F.2d 55, *cert. denied* 389 U.S. 847, in these words: "*Deal* [upheld] the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials."[6]

If the nature of the violation determines the scope of the remedy, it becomes critical to determine whether or not there is an unremedied district-wide segregative act. This Court found in its Order of July 13, that specific segregative acts, since eliminated; the existence of optional attendance zones, now eliminated; and conditions of racially imbalanced schools together required action by the federal courts.

We do not deal with a mandated dual school system; we do not deal with actions taken on a school-by-school basis.[7] We do deal with a system that has in the past permitted segregative practices to exist. The issue, therefore, is whether a plan intended to improve the educational opportunities for all students without a school-by-school restructuring basis is appropriate. This Court holds at this time that it is.

III. Plaintiffs' Plan

The plaintiffs have urged upon this Court a plan which will assign students among the Dayton schools in a black/white

[6] *Higgins* mentions *Brinkman* v. *Gilligan* on page 19. This Court respectfully suggests that the following sentence contained therein: "These three findings were held in their cumulative effect to be enough to reflect *de jure* segregation.", requires for full significance an examination of the specific holding of the court. See footnote 7 *infra.*

[7] The only district-wide action of the defendants involved the rescission of resolutions in January of 1970. The United States Court of Appeals dealt with the issue as follows:

"We hold that the findings of fact upon which the District Court based its conclusion of accumulative violations are not clearly erroneous but to the contrary are amply supported by the evidence. Fed. R. Civ. P. 52A. However, we do not pass upon the question at the present time as to whether the rescission of the Board resolutions in and of itself constituted an independent violation of the Constitution. *Brinkman* v. *Gilligan,* 503 F.2d 684 at 693.

ratio approximating the district-wide ratio for such schools with a variation of 15%, plus or minus, from the mean.[8] To accomplish this, the plaintiffs would create "clusters" of elementary schools, additional middle schools, and redistricted high schools. The term "cluster" is taken to mean a group of schools, usually more than two, within a common attendance district to which students will be sent irrespective of proximity to their place of residence.[9] Plaintiffs' plan is a comprehensive one; it was carefully prepared and well-presented. It will do what the plaintiffs urge must be done. It is not intended to, nor will it, in and of itself, provide alternate educational programs or seek innovative learning experiences. In the plaintiffs' view, these are obligations of any school board irrespective of the integration or segregation of the schools. Since this question is not before the Court, it will not be ruled upon.

In the Order of Remand by the United States Court of Appeals for the Sixth Circuit, the following appears:

"In formulating a desegregation plan, the District Court, of course, will adhere also to the guidelines enunciated by the Supreme Court in *Milliken* v. *Bradley*, — U.S. —, 94 S.Ct. 3112 (1974)."

The majority opinion by Chief Justice Burger includes the following: "Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated – in

[8] According to the testimony the appropriate percentages of Black students for the year 1974-1975 are:

Elementary Schools	44.2%
Middle Schools	68.7%
High Schools	45.5%

[9] Portions of the record dealing with this transportation are included herein as Appendix A.

their view of what constituted desegregation – unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole. . . . In *Swann* which arose in the context of a single independent school district the Court held, 'If we were to read the holding of the District Court to require as a matter of substantive Constitutional rights any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse; 402 U.S. at 24.

The clear import of this language from *Swann* is that desegregation in the sense of dismanteling a dal school system does not require any particular racial balance in 'each school, grade or classroom.'" 94 S.Ct. at 3125.

It would seem, therefore, that whether the area in question is a single school district as in *Swann* or in multi-school districts as in *Milliken*, the obligation does not exist to create racial balance which is in essence the sole function of the plaintiffs' plan.

Accordingly, this Court holds that a comprehensive plan, such as plaintiffs suggest, is not required at this time. We hold also that plaintiffs' plan as presented is violative of the Equal Educational Opportunities Act, 20 U.S.C. § 1701, *et seq.*, and particularly §§ 1713 and 1714.

IV. The Defendant's Plan

The defendant's plan was presented to the Court in a 17 page memorandum with a 26 page exhibit of tables and statistics and a 69 page appendix. It also contains much extraneous material. Only the "magnet" program and the "learning centers" concept require comment.

A magnet high school[10] with programs not offered at home high schools and "satellite" magnet programs intended to attract students from their high schools and districts of resi-

[10] The term "magnet high school" is deemed to mean a school open to all students with programs sufficiently attractive that students will elect to attend. The Stivers-Patterson vocational complex is one example of a magnet school.

dence is proposed. If successful, the magnet program will provide an opportunity to students, both black and white, to obtain additional educational advantages equally attractive to both. Magnet schools are an acceptable desegregation device. 20 U.S.C. § 1713(f).

The magnet's schools are supplemented by "learning centers" for foreign languages and business education for 6th, 7th, and 8th grades; career motivation for 4th and 5th grades; science for 5th, 6th, 7th and 8th grades; and a science environmental center for the 6th grade.

Learning centers to which students are transported are integrative in concept. Plaintiffs assert that such transportation is also violative of 20 U.S.C. §§ 1713 and 1714 since it would require bussing of students to schools other than the school closest or next closest to his or her place of residence. We leave this argument for another day and another court. We hold only that the plan comports with the Congressional declaration of policy set forth in 20 U.S.C. § 1701.

The overall plan is desegrative in intent; it is not violative of *Brown* v. *Board of Education, supra,* and it does not appear to violate the mandate of the United States Court of Appeals for the Sixth Circuit so long as the following limitations are observed:

1. All programs including the magnet schools and the learning centers must be so located that the burden of transportation is substantially equal upon both black and white students;

2. The composition of all classes must be no less than the mean for the appropriate schools plus or minus 15%;[11]

3. The faculty assigned to all programs must reflect the racial percentages of faculty within the system as a whole;

[11] See Footnote 9.

4. The amount of time of student assignment to classes in learning centers shall not be less than 20% of such student's total instructional time.

It is entirely possible that the proposed program will not attract an appropriate number of black and white students and might instead further segregate the Dayton school system. Because it is innovative, because it offers the opportunity for alternative quality education, and because it has been proposed by a board of popularly elected officials, the Plan should be given a fair trial. The Board's plan will be accepted provisionally for the school year 1975 – 1976. The provisional acceptance requires this Court once more to continue jurisdiction of this matter.

There is an omission in the comprehensive plan submitted by the defendants. It is not possible to determine whether the numerous desegregative techniques set forth in this Court's Order of January 7, 1975, have been fully investigated. It is not known, for example, whether adjustments of existing school attendance zones would reduce concentrations of black and white attendance. It is not known whether feasible pairing or clustering of schools could be accomplished without bussing violative of the Equal Educational Opportunities Act.

Accordingly, the defendants are directed to conduct such a study and to report to this Court on or before October 1, 1975, of the results thereof on a school-by-school basis. Further hearings will thereupon be held and an alternative plan consistent with the Equal Educational Opportunities Act will be established on or before January 1, 1976.

In the event defendants are unable by the methods approved in July of 1973 and those approved by this Order to accomplish what this Court deems to be adequate progress in complying with the Equal Educational Opportunities Act and the mandate of the United States Court of Appeals for the Sixth Circuit, such alternative plan will become effective for the school year beginning in September, 1976, and for all school years thereafter.

V. The Dayton School Board

The willingness of this Court to accept defendant's plan at this time is dictated in part by the attitude of the School Board in the City of Dayton. This Court has not been faced with the problems of Judge James B. McMillan who dealt with a recalcitrant school board in *Swann* v. *Charlotte Mecklenburg Board of Education, supra,* nor with those of Judge W. Arthur Garrity, Jr., who has dealt with a contumacious school board in Boston. Any reasonable plan submitted by a board which has demonstrated good faith is entitled in the first instance to careful consideration by a court and in cases of doubt to have such doubt resolved in its favor. Good faith is a two-way street.

VI. Progress of the Case

The pace at which desegregation cases proceed through the courts has been a source of concern by courts and a source of frustration for litigants.[12] It has frequently been observed that over 21 years has elapsed since *Brown* v. *Board of Education, supra,* and the problem appears far from solved. It can even be asserted that the magnitude of the problem has in fact increased in that time. To postpone yet again the ultimate determination of this matter may appear to the plaintiffs to be a further delay of their rights. A chronology of the significant

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[12] The complexities of school desegregation have resulted in the following instances of prolonged litigation:

a. *Goss* v. *Board of Education of the City of Knoxville, Tennessee,* original District Court opinion, 186 F.Supp. 559 (1960), recent opinion of United States Court of Appeals for the Sixth Circuit, 444 F.2d 632 (1971);

b. *Kelly* v. *Board of Education of the City of Nashville* (subsequently Metropolitan County Board of Education of Nashville), original District Court opinion, 139 F.Supp. 578 (1956), recent opinion of the United States Court of Appeals for the Sixth Circuit, 463 F.2d 732 (1972).

c. "These appeals represent another installment of an already lengthy serial: 'The desegregation of the Memphis Public School System'. The initial chapter of this story was written in 1960 . . ." *Northcross* v. *Board of Education of Memphis City Schools,* 466 F.2d 890 (1972).

dates in this proceeding might held to place the matter in its proper context.

This case was filed in May of 1972. It was heard on the merits in November of 1972.

A Findings of Fact and Memorandum Opinion of Law was filed in February of 1973. An Order imposing integrative remedies upon defendants was filed in July of 1973. During the school year 1973 – 1974 and 1974 – 1975 these remedies were in effect.

The Order of Remand by the United States Court of Appeals for the Sixth Circuit became effective in October of 1974. The Order herein will at the minimum be effective for the school year 1975 – 1976.

While this is hardly a model of speed and dispatch, it is consistent with the magnitude of the problem that must be solved.

In the mass of rhetoric, emotional outbursts, and demogoguery that have attended the progression of many school desegregation cases, a few voices have been heard to suggest a rule of moderation. One such by Senior Judge Clifford O'Sullivan of the United States Court of Appeals for the Sixth Circuit bears repetition:

> "The hope or dream that one day we will have become a people without any motivation borne of our differing racial beginnings will have a better chance of fulfillment if patience accompanies our endeavors. Strident and truculent judicial commands could indeed exacerbate what now remains of racial bias and prejudice."
> *Goss* v. *Board of Education of the City of Knoxville, Tennessee,* 444 F.2d 632 at 640.

VII. Conclusion

In view of the foregoing, the Court holds as follows:

1. The plan of the defendants as modified herein will have an integrative effect upon the Dayton school system and is provisionally adopted for the school year 1975 – 1976.

2. The plan of the plaintiffs is violative of The Equal Educational Opportunities Act, 20 U.S.C. § 1701, et seq., and imposes a burden upon the defendant school board beyond that which it is presently required to bear.

3. The state of the law in desegregation cases, the Order of Remand in this case, and the Congressional intent in the Equal Educational Opportunities Act, supra, do not require the adoption of a mathematical ratio plan wherein each school, grade or classroom of the district shall contain any particular balance of black and white students representative of the district as a whole.

4. Where the previous actions of a school board indicate only a difference of opinion on a subject concerning which reasonable minds may reasonably differ, bad faith will not be presumed and a proposal, although novel and untried, will be given an opportunity for success.

5. In view of the developments, subsequent to August 20, 1974, the Court is of the opinion that holdings herein regarding the Equal Educational Opportunities Act involve a controlling question of law as to which there is substantial grounds for difference of opinion and an immediate appeal from this Order may materially advance the ultimate termination of the litigation. Accordingly, the Court does so certify in accordance with 28 U.S.C. § 1292(4)(b). An application for appeal in accordance with this determination shall not stay the proceedings in this Court.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX A TO MARCH 10, 1975 ORDER

. . . after this matter was raised during the Louisville argument in the Sixth Circuit, and the Court's inquiry was whether or not the Act of Congress could overcome the constitutional provisions which were being enforced by the courts, and I think I had related that to the witness. I am not sure, but I was present when the Sixth Circuit asked that question, and that conformed with my earlier reading of the Broomfield Amendments which had a similar purpose but, however, had the same saving clause about the power of the courts is not impaired where necessary to remedy a constitution violation.

THE COURT: Well, we are not going to debate the constitutionality of an Act of Congress. I am concerned with the presentation of a plan where it is somewhat peripheral as to the consideration of this Act.

Mr. Greer, you may continue.

CONTINUATION OF CROSS EXAMINATION

BY MR. GREER:

Q. Yesterday, Doctor Foster, we discussed the schools that were left unaffected by your pairing and clustering at the elementary level, and the two examples of the contiguous pairing in your plan. Let's move on to the other nine clusters that comprise your elementary school plan. Each of those nine clusters involve a substantial amount of required bussing of school children to schools beyond those that are closest or next closest to their place of residence; isn't that correct?

A. I believe that is correct, yes.

Q. Let's look, for example, at cluster F of your group. A child in the Lewton school district which is in the eastern part of Dayton is required to spend grades 4 and 5 in Edison school which is on the west side of Dayton; is that not right?

A. That's right.

Q. And am I not also correct that the following schools are closer to the Lewton district: Eastmont, Grant which you are converting to a middle school —

A. Would you hold that just a minute so I can make a note of those?

Q. Sure.

A. All right. Between Lewton and Edison you are speaking of?

Q. That's correct.

A. And what are the schools again?

Q. Well, let me just list them off It would be Eastmont, Kemp, Washington which in your original plan you were going to close, Franklin, Cleveland, Belmont, Horace Mann and then another school that you are planning to turn into a middle school which is Ruskin, Huffman, Webster, Emerson, Patterson, McGuffey, Hawthorne which is your original plan was going to be closed, Irving and Whittier.

A. Well, if you are talking about a direct line between the two schools, you couldn't possibly get all those schools in between the two you are speaking of.

Q. My question wasn't phrased in terms of the way the crow flies. It is whatever schools are closer to the residence of a child living in the Lewton district, and all of those schools would be closer to that child's residence; isn't that true?

A. You mean as the crow flies?

Q. Let's get a lame crow and say going in any direction. Let's make an arc just so we know the distance of what is closer to a child living in the Lewton district.

A. It would say it generally might be true, but to say it was true, I would want to go to the map.

THE COURT: Why don't you do that, Doctor.

THE WITNESS: How many schools did you name altogether?

BY MR. GREER:

Q. Eighteen different schools.

A. All right.

Q. And the same type of situation, of course, would be true in that cluster with respect to students living in the Edison district who would be going over to the east end of Dayton in grades 1 through 3; isn't that true?

A. Yes.

Q. If we turn to cluster C, a child in the first or second grade at Eastmont would be required to be bussed beyond some seventeen or eighteen closer schools in order to attend classes at Highview; isn't that correct?

A. Yes.

Q. And vice versa the same kind of situation would be true for a child living in the Highview district during grades 3 to 5?

A. Yes.

Q. If we look on cluster I, the required bussing between Gardendale and Shiloh passes by ten school zones which are closer to the residences of the children in those two affected school districts; isn't that right?

A. Without counting them, I would believe that is probably accurate, yes.

Q. And without going through the tedium of each of these clusters, isn't it true that the same kind of cross-town required bussing affects students in 24 out of the 28 school zones that are paired or grouped in clusters under your proposal?

A. Again without counting, I would believe that would probably be accurate, yes.

Q. And you have before you the statistics, of course, as to the number of children enrolled in these various schools, don't you?

A. Yes.

Q. Am I not correct in each year something in the area of 9,000 students under your plan would be bussed beyond the second closest school to their place of residence?

A. Pardon me just a second.

Well. I don't get quite that many. At a quick count, I get something like 7,000.

Q. Does that comprise all of the students in these 24 out of 28 school Zones?

A. It would comprise the students in the clusters that you referred to, and our count should be the same because my counts were the same as your staff person that testified about students being bussed in the clusters.

Q. Right. What you just computed for me has been the nine out of the eleven clusters that we started talking about today?

A. That's correct.

F. COURT OF APPEALS' JUNE 24, 1975 OPINION.

(Filed June 24, 1975)

No. 75-1410

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BRINKMAN, ET AL.,
Plaintiffs-Appellants,

v.

JOHN J. GILLIGAN, ET AL.,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PHILLIPS, Chief Judge. For a second time this court is called upon to review the constitutionality of a plan ordered by the District Court for the school system of Dayton, Ohio, to remedy cumulative constitutional violations found to exist in that school system. Reference is made to the previous decision of this court, reported at 503 F.2d 684 (6th Cir. 1974), for a detailed recitation of facts and issues.

By a statute enacted February 22, 1887, the State of Ohio abolished separate schools for white and Negro children. Nevertheless, the District Court found that the Dayton school system has failed in many particulars to meet the standards of Ohio law mandating an integrated school system and to comply with the equal protection clause of the fourteenth amendment. Segregative acts and practices were found to have occurred both before and after the decision of the Supreme

Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and to have continued down to the present time. These findings of fact as to segregative practices in Dayton are set forth in detail in our former opinion and will not be repeated here. Suffice it to say that in our former opinion this court ruled that the findings of fact of the District Court as to unconstitutional practices on the part of Dayton School officials are not clearly erroneous, but to the contrary are supported by substantial evidence.

Although the phrase "de jure" does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices. *See Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

We agreed with the District Court as to his findings of fact in our former opinion, but held the remedy ordered by that court to be inadequate, considering the scope of the constitutional violations. We remanded the case to the District Court with directions to formulate a desegregation plan for the Dayton school system consistent with the remedial guidelines outlined in *Keyes, supra*, and in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

In our former opinion we said:

> Once the plaintiffs-appellants have shown that state-imposed segregtation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Keyes, supra*, 413 U.S. at 200, 93 S.Ct. at 2693. When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate. *Id.* at 210-213, 93 S.Ct. 2686. 503 F.2d at 704.

On remand the District Court required the plaintiffs and the Board of Education to submit plans. The plaintiffs' plan

was rejected. The Board's plan was adopted for the school year 1975-76 with minor modifications.

The present appeal is from the decision of the District Court implementing the Board's plan. The question on appeal is whether the Board's plan conforms to the mandate of this court in our decision reported at 503 F.2d 684. We hold that it does not.

The plan approved by the District Court contains some provisions which apparently might effect some improvements in the segregated conditions found to exist in this school system. Some of its key features are as follows:

1. The closing of Roosevelt High School, with its 100 per cent black enrollment. The students previously enrolled at Roosevelt High would be permitted to attend any high school of their choice.

2. Creation of a downtown magnet high school at the Central YMCA, with programs not offered at home high schools, to serve a maximum of 300 students at any one time, and satellite magnet programs intended to attract students from their high schools and districts of residence, which could serve not more than 375 students at any one time. The District Court said: "If successful, the magnet program will provide an opportunity to students, both black and white, to obtain additional educational advantages equally attractive to both." The students would remain in their assigned schools for all other instruction.

3. Creation of three magnet learning centers at which elementary students could participate in foreign language, career motivation, and business education programs. The three centers together would serve about 880 students, who would remain in their assigned schools for other instruction.

4. Expansion of science centers to accommodate additional elementary students. The centers would have a racially balanced enrollment, and attendance would be mandatory, but only ten percent of the student's total instruction time would be spent at the centers.

5. A new vocational school for high school students, known as Kiser Career Center, would be established. This school would have a balanced racial composition, serving 210 students on a free-choice basis.

6. Restructuring of Miami Chapel elementary school into an alternative elementary school with enrollment optional and on a full-time basis. Miami Chapel has a capacity of over 700 students, but the Board anticipates that the school as restructured will serve approximately 500 students. Miami Chapel presently is an all-black school serving 380 students, and there is some indication in the record that these students, if not admitted to the restructured school, will be assigned to the all-black Louise Troy or Wogaman schools.

7. Creation of a magnet alternative school for 150 intermediate grade level students in an attempt to keep potential drop-outs in school, without regard to race.

8. The freedom of enrollment and open enrollment programs put into effect earlier by the Board would be continued.

In approving this plan, the District Court added the following provisions:

1. All programs including the magnet schools and the learning centers must be so located that the burden of transportation is substantially equal upon both black and white students;
2. The composition of all classes must be no less than the mean for the appropriate schools plus or minus 15%;
3. The faculty assigned to all programs must reffect the racial percentages of faculty within the system as a whole;
4. The amount of time of students assignment to classes in learning centers shall not be less than 20% of such student's total instructional time.

This is essentially all the relief afforded by the District Court

for the 1975-76 school year. The court expressed uncertainty as to whether the plan would be completely effective and ordered the Board to develop and file a more comprehensive plan by January 1, 1976. The court stated that if the 1975-76 plan should prove to be ineffective, an alternate plan would be instituted for the school year beginning in September 1976.

The District Court described the approved plan as "desegregative in intent" and concluded that it would have "an integrative effect." It appears that the plan contains some significant curricular innovations and that it would be a step toward integration of the Dayton school system. We believe, however, that more is required by the Constitution, by recent decisions of the Supreme Court, including those herein cited, and by the previous mandate of this court. As the appellants point out, under the plan approved by the District Court the basic pattern of one-race schools will continue largely unabated. The plan does not even purport to dismantle Dayton's one-race schools other than Miami Chapel and Roosevelt High School, and even if the magnet plans are successful, the vast majority of one-race schools will remain identifiable as such. The District Court's plan fails to eliminate the continuing effects of past segregation and is, therefore, inadequate.

In the course of his opinion, the District Judge noted two events which have occurred since our first opinion in this case, both of which he thought supported the narrow remedy he ordered on remand.

The District Court said:

> First: Effective October 20, 1974, the Congress of the United States adopted the Equal Educational Opportunities Act, 20 U.S.C. § 1701 *et seq.*
>
> Section 1701 declares it to be the policy of the United States that:
>
> "1. All children enrolled in public schools are entitled

to equal educational opportunity without regard to race, color, sex, or national origin; and

2. The neighborhood is the appropriate basis for determining public school assignment."

Section 1712 imposes a limitation upon courts in the following language: "In formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct *particular denials of equal educational opportunity or equal protection of the laws.* [Emphasis added]

In § 1713 is listed a priority of remedies and in § 1714 there is a specific limitation which holds: "No court . . . shall pursuant to § 1713 of this Title order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such students."

Second: On December 6, 1974, the United States Court of Appeals for the Sixth Circuit decided *George and Carolyn Higgins* v. *Board of Education of the City of Grand Rapids,* (No. 73-2189), 508 F.2d 779 (1974). The Court in *Higgins* followed *Deal* v. *City of Cincinnati Board of Education,* 369 F.2d 55, *cert. denied* 389 U.S. 847, in these words: "*Deal* [upheld] the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials."[6]

[6] *Higgins* mentions *Brinkman* v. *Gilligan* on page 19. This Court respectfully suggests that the following sentence contained therein: "These three findings were held in their cumulative effect to be enough to reflect *de jure* segregation.", requires for full significance an examination of the specific holding of the court.

The Equal Educational Opportunity Act of 1974 by its terms does not prevent the District Court from carrying into effect

the previous mandate of this court. 20 U.S.C. § 1702(b) expressly provides:

> (b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, *except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.* (Emphasis supplied.)

We construe the 1974 Act, read as a whole, as not limiting either the nature or the scope of the remedy for constitutional violations in the instant case.

There could be no possible merit in the contention that the opinion of this court in *Higgins,* relating to the school system of Grand Rapids, Michigan, altered in any way the nature of the cumulative violations described in our former opinion in the present case or the scope of the constitutional remedy required by this court on the remand which we directed in that opinion. The law in the present case is embodied in the opinion of this court reported at 503 F.2d 684. Our previous opinion is not changed in any way by *Higgins,* which dealt with a different school system and a distinguishable factual situation.

Appellants have petitioned for summary reversal. Except for the time factor, we would be inclined to grant this relief. However, it obviously would be difficult if not impossible, in the limited time now available, for the District Court to formulate a comprehensive plan for the 1975-76 school term and to put it into effect in September 1975 without disruption of the large school system in the Dayton school district.

Instead of summary reversal, we remand this case to the District Court with directions to modify the plan previously approved for the 1975-76 school year so as to improve the racial

balance before September 1, 1975, in as many of the remaining racially identifiable schools in the Dayton system as feasible.

We further direct that black students who attended the Miami Chapel elementary school during the 1974-75 school year, and who are not assigned to the restructured Miami Chapel school, be assigned to other than all-black schools during the 1975-76 school year.

The District Court already has expressed an intention to adopt a revised and improved plan for the school year 1976-77. On remand we direct that the court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keys* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976.

This case is remanded to the District Court for further proceedings consistent with this opinion.

The mandate of this court on the present appeal will issue forthwith. The costs of this appeal are taxed against the Dayton Board of Education.

G. COURT OF APPEALS' JUNE 24, 1975 REMAND JUDGMENT.

(Filed June 24, 1975)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1410

MARK BRINKMAN, ET AL.,

Plaintiffs-Appellants,

v.

JOHN J. GILLIGAN, ET AL.,

Defendants-Appellees.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from

the Dayton Board of Education the costs on appeal, as itemized below, and that execution therefore issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
By /s/ GRACE KELLER
Grace Keller
Chief Deputy

Issued as Mandate: June 24, 1975
COSTS: Amount to be determined later
Filing fee ----------$
Printing $
Total $

A True Copy.

Attest:

John P. Hehman, Clerk
By /s/ GRACE KELLER
Chief Deputy

H. DISTRICT COURT'S DECEMBER 29, 1975 ORDER.

(Filed December 29, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-75-304

MARK BRINKMAN, et al.,
Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,
Defendants.

ORDER

This matter is before the Court pursuant to Order of Remand by the United States Court of Appeals for the Sixth Circuit expressed in the following terms:

> We direct that the Court adopt a system-wide plan for the 1976-1977 school year that will conform to the previous mandate of this Court and the decisions of the Supreme Court in *Keyes* and *Swann*.[1]

Pursuant to such remand, defendant Dayton Board of Education and plaintiff NAACP presented plans to the Court. Testimony and evidence in support thereof was presented on December 8-9, 1975. A third plan based upon findings by the late Dr. Charles A. Glatt, Court-appointed expert, was presented by a group known as "Friends of Dr. Glatt" although no evidence or testimony accompanied such plan. The Court notes in passing the significant contribution of Dr. Glatt to this most complex problem.

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[1] *Brinkman* v. *Gilligan*, 518 F.2d 853 at 857.

A determination of this matter and its future progress will be considered under the following headings:

I. Standards of Examination

II. Master

III. Community Participation

IV. Conclusions of Law

I.

STANDARDS OF EXAMINATION

Given the predicate that the limited segregatory activities found by this Court in its Order of February 7, 1973, brings this matter within the ambit of *Swann*[2] and *Keyes*,[3] the remedy must be obvious. This Court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system. Based upon the plans of both the plaintiff and defendant the assumption must be that the transportation of approximately 15,000 students on a regular and permanent basis will be required. No contrary remedial suggestion has been offered by any person or group. No authority has been found or cited that would justify any other disposition.

An analysis of the two plans submitted discloses more a difference of technique than a difference of result. In essence, the plaintiffs would pair and cluster existing elementary schools in a fashion to insure a racial balance approximating that of the school district as a whole with existing attendance zones of such schools remaining approximately intact. The existing

[2] *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1973).

[3] *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

elementary schools would provide feeder patterns for the appropriate high schools. Under plaintiff's plan almost every student would at some time be transported to and from school.

Defendants' plan is based upon a series of choices to be made by parents which will provide educational alternatives.[4] Defendants have agreed that there is nothing inherent in their plan to prevent racial balancing appropriate to the district as a whole and it is in this context that such plan has been considered.

It would be foolish indeed to ignore the rhetoric that has accompanied twenty years of the school desegregation problem. The catch phrases, "forced busing," "quality education," "racial balance," and "white flight," have served as a form of shorthand mainly to obscure rather than to clarify the nature of the problem involved.

This Court's position and determination can best be understood by a reference to personal judicial philosophy as it bears upon the overall subject of educational racial discrimination.

I believe that it is not the function of the United States District Court to oversee the methods whereby children are instructed. I believe that it is not the function of the United States District Court to advance by judicial fiat any social philosophy, however benign. The temptation to do either or both has proved almost irresistible in the field of school desegregation.

The qualitative nature of education is a matter for local determination. The citizens of a school district are entitled to select, free from federal supervision, those elected representatives who in the citizens' collective opinion will best administer such school system. The citizens are entitled to determine the amount they are willing to pay for the educational

[4] Counsel for the defendants has asserted that defendants have "submitted" a plan rather than "proposed" or "recommended a plan. In view of this Court's holding (page 8), the distinction appears irrelevant.

facilities they desire. It might appear that the foregoing statement is basic enough to be included in an eighth grade Government text. True. But the significance of this lesson apparantly has been lost upon those who ignore its validity. It is only when elected representatives deny equality of treatment that federal courts should intervene.

It can be urged with assurance that in a pluralistic society all children should be exposed at the earliest feasible time to children of other backgrounds. True. I agree that both the children and society itself will benefit. I do not agree, however, that a failure of exposure, in and of itself, amounts to a constitutional deprivation correctable only by the federal courts. In sum, there are aspirations of a peaceful and happy society that do not rise to a constitutional level and are not therefore attainable in a court of law.

Court deal with rights, not ethical behavior, not social accommodations, but rights, rights guaranteed by the Constitution of the United States. That is and should be the limit of our function.

In contrast to the foregoing, it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.

The only feasible method of sharing requires a balancing in each school between black and white students in a ratio approximating the system-wide balance. Insofar as either plan will result in an acceptable redistribution, such plan meets the constitutional limitations set forth in both the *Swann* and *Keyes* cases.

The defendants may adopt their own plan, may adopt the plaintiff's plan, may combine the two, or any parts thereof, provided that each school in the school district as of September 1, 1976, is desegregated as defined herein.

Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced: None is acceptable if not.

At this time the composition of the Dayton School District is approximately 48% black – 52% white. So long as the schools of the Dayton School District each reflect this district ratio plus or minus 15%, they will be deemed to be desegrated.[5] Accordingly, this Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton School District will have a pupil population approaching the district percentage, but deviating no more than 15%, plus or minus.

There is a specific and limited exception from the foregoing that the Court will permit. Under the present system in force in Dayton, Ohio, students commence attendance at a specific high school in the tenth grade and remain there until graduation some three years later at the end of the twelfth grade. A high school is more than a collection of classrooms. It is an entity in which the students take deep pride. It is frequently the first and often the last educational entity with which students identify. There would appear to be something unfair in a situation that might destroy the continuity of athletic teams, student publications and activities. The one or two years already spent in a high school has created a loyalty that should be encouraged. There are all too few such institutions still remaining in our society today.

Limited only to high school students and limited only to the academic years of 1976-1977 and 1977-1978, the Court will permit those students already enrolled in a specific high school to graduate from that high school, even though the ultimate determination of attendance boundaries would exclude them therefrom. This privilege shall not be extended to any student not already enrolled in the tenth or eleventh grades of a specific high school.

The Court notes the following language in *Swann*:

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[5] See Footnote 12, *Higgins* v. *Board of Education of the City of Grand Rapids*, 508 F.2d 779 at 787 (6th Cir. 1974).

> The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.[6]

In a situation, however, where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis.

II.

MASTER

In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary students.

1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
2. Students should be transported to the nearest available school;
3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

The logistics involved will be complex and time-consuming. The establishment of attendance zones for each of the schools will require supervision by this Court. Accordingly, in accordance with Rule 53 of the Federal Rules of Civil Procedure, the Court does find that this case is one wherein exceptional conditions require the appointment of a Master.

Dr. John A. Finger of Providence, Rhode Island, is hereby appointed Master to supervise such undertaking. Such Master will have all of the powers set forth in Rule 53(c),

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[6] *Swann*, *supra* at page 24.

Fed. R. Civ. P., and will at the earliest possible time submit to this Court a report indicating the number of students by race who will attend each of the schools in the Dayton school system in accordance with the direction set down heretofore. An opportunity will be given to the defendant to obtain promptly information regarding parent choices as outlined on pages 81-83 of the defendant's plan. Such Master will receive out-of-pocket expenses and compensation for his services rendered in such amount as the Court may determine. Previous Orders of this Court directing assistance to Dr. Finger will apply equally to his service as Master.

III.

COMMUNITY PARTICIPATION

The parties are in agreement that a citizens board should be appointed to monitor the plan as ultimately adopted and to insure that it functions in accordance with the Order of this Court. Such a board composed of representative citizens of the community will be appointed for a period not to exceed three years. The Court will reserve the right to extend or to terminate the services of such board, should such prove advisable. Defendants are directed to make space available for the needs of such board, to provide necessary secretarial and clerical assistance, and to make available at all reasonable times such information as the board may from time to time require. The members of this board will serve without compensation, but will be reimbursed for out-of-pocket expenses which will be taxed as court costs in this matter.

IV.

CONCLUSIONS OF LAW

A.

A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated

system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education.*

B.

Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such system.

C.

Educational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations so long as the requirements of Conclusion of Law A are followed.

D.

Defendant, Dayton Board of Education, must provide adequate transportation for all students affected by reassignment to comply with this Order.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

I. DISTRICT COURT'S DECEMBER 29, 1975 JUDGMENT.

(Filed December 29, 1975)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-304

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that limited only to high school students and limited only to the academic years of 1976-1977 and 1977-1978, the Court will permit those students already enrolled in a specific high school to graduate from that high school, even though the ultimate determination of attendance boundaries would exclude them therefrom. This privilege shall not be extended to any student not already enrolled in the tenth or eleventh grades of a specific high school. Where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis.

In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary students.

1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;

2. Students should be transported to the nearest available school.

3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

The establishment of attendance zones for each of the schools will require supervision by this Court. Accordingly, in accordance with Rule 53 of the Federal Rules of Civil Procedure, the Court does find that this case is one wherein exceptional conditions require the appointment of a Master.

Dr. John A. Finger of Providence, Rhode Island, is hereby appointed Master to supervise such undertaking. Such Master will have all of the powers set forth in Rule 55 (c), Fed. R. Civ. P., and will at the earliest possible time submit to this Court a report indicating the number of students by race who will attend each of the schools in the Dayton school system in accordance with the direction set down heretofore. An opportunity will be given to the defendant to obtain promptly information regarding parent choices as outlined on pages 81 – 83 of the defendant's plan. Such Master will receive out-of-pocket expenses and compensation for his services rendered in such amount as the Court may determine. Previous Orders of this Court directing assistance to Dr. Finger will apply equally to his service as Master.

The parties are in agreement that a citizens board should be appointed to monitor the plan as ultimately adopted and to insure that it functions in accordance with the Order. A board composed of representative citizens of the community

will be appointed for a period not to exceed three years. The Court will reserve the right to extend to or terminate the services of such board, should such prove advisable. Defendants are directed to make space available for the needs of such board, to provide necessary secretarial and clerical assistance, and to make available at all reasonable times such information as the board may from time to time require. The members of this board will serve without compensation, but will be reimbursed for out-of-pocket expenses which will be taxed as court costs in this matter.

A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education.*

Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such systems.

Educational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations so long as the requirements of Conclusion of Law A are followed.

Defendant, Dayton Board of Education, must provide adequate transportation for all students affected by reassignment to comply with this Order.

Dated at Dayton, Ohio, December 29, 1975

JOHN D. LYTER, CLERK
/s/ Rebecca J. Ellis, Deputy

J. DISTRICT COURT'S MARCH 23, 1976 ORDER.

(Filed March 23, 1976)

No. C-3-75-304

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARK BRINKMAN, et al,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al,

Defendants.

ORDER

This matter is before the Court for consideration of the Master's report heretofore filed. Pursuant to the filing of such report a hearing was held March 22 and 23, 1976, in accordance with Rule 53(e)(2) of the Federal Rules of Civil Procedure. At such hearing the parties were given an opportunity to present evidence and testimony.

Upon consideration of such report and the testimony and evidence presented, the Court is of the opinion that such report should be disposed of as follows:

I.

ELEMENTARY SCHOOLS

That portion of the Master's report dealing with the desegregation of elementary schools in the Dayton School District by the device of pairing is in keeping with the mandate of the United States Court of Appeals for the Sixth Circuit and the order of this Court dated December 29, 1975. Accordingly, such pairing assignment is hereby adopted.

The Master's report recommends a semiannual exchange of paired schools with a similar exchange assignment of teachers.

Defendant Dayton Board of Education has proposed an annual exchange without movement of teachers (Board Exhibit CW).

Subject to the limitations set forth on page 5 of this Court's order of December 29, 1975,[1] defendant may adopt either method.

The proposal of defendant Dayton Board of Education seeks a three-phase implementation over a three year period. In view of the mandate of the United States Court of Appeals for the Sixth Circuit, 518 F.2d 833 at 857, such "phase in" is hereby rejected.

Certain elementary schools will be desegregated by zone change. Such zone changes as are recommended in the Master's report are hereby approved.

II.

HIGH SCHOOLS

The Master's report for desegregating high schools recommends a selection by students plus a random assignment where necessary (Master's report pp. 15-18). Defendant has suggested an assignment program by specific attendance districts (Board Exhibit CV).

Subject to the limitations set forth on page 5 of this Court's order of December 29, 1975, and subject further to the exception for high school juniors and seniors set forth on pages 5 and 6 of such order, defendant may adopt either method of assignment.

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[1] "At this time the composition of the Dayton School District is approximately 48% black — 52% white. So long as the schools of the Dayton School District each reflect this district ratio plus or minus 15%, they will be deemed to be desegregated. Accordingly, this Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton School District will have a pupil population approaching the district percentage, but deviating no more than 15%, plus or minus."

III.

MISCELLANEOUS

The report of the Master dealing with "Handicapped and Special Education Program," "Magnet Schools," and "Magnet Programs for Grades 6, 7 and 8" are hereby adopted.

Defendant's attention is directed again to the following portion of the order of December 29, 1975:

> "Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced. None is acceptable if not."

IV.

FURTHER PROPOSALS

The order of reference heretofore referred to directed the Master to report upon particular issues. Portions of the Master's report not dealing with those particular issues will be deemed personal recommendations of such Master and not requiring action by this Court.

This order is intended to be a final and appealable order and a determination pursuant to the mandate of the United States Court of Appeals for the Sixth Circuit.

No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

It must be obvious to all parties concerned that the longer an opportunity is given for students, teachers and the community to understand a specific plan, the easier a transition period will be. In any proposal for a change after this date, the Court will take into consideration the amount of "lead time" available prior to September 1, 1976. In the event the Court determines that a proposed change should be adopted

but that insufficient time remains prior to September 1, 1976, such improvement may be adopted effective September 1, 1977, or such other date as might appear appropriate at the time.

V.

SUMMARY

Defendant has raised five objections to the report of the Master:

1. Pupil assignment should be made by the central administration;
2. Pupil assignment should be made in the spring of 1976;
3. Transfer of elementary students should be made on a yearly rather than on a semester basis;
4. The Elementary School Plan should be a three-phase plan and
5. High School assignment should be on the basis of geographic zone rather than upon choice and random assignment.

The Court has disposed of such objections as follows: With the exception of Objection 4 which has been rejected, the defendant Dayton Board of Education may assign students by action of the central administration, may assign students this spring, may transfer elementary school students on an annual basis, and may assign high school students by geographic zones.

All of the foregoing being subject to the limitations of this Court's order of December 29, 1975.

All other questions still remaining before the Court, such as payment of attorney fees and the sharing of costs among the several defendants herein are hereby continued for further disposition.

IT IS SO ORDERED.

CARL B. RUBIN
United States District Judge

K. DISTRICT COURT'S MARCH 25, 1976 JUDGMENT.

(Filed March 25, 1976)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-304

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that upon the consideration of the Master's report and the testimony and evidence presented in accordance with Rule 53(e)(2) of the Federal Rules of Civil Procedure, that such report should be disposed of as follows:

I ELEMENTARY SCHOOLS: That portion of the Master's report dealing with the desegregation of elementary schools in the Dayton School District is hereby adopted. Defendant Dayton Board of Education has proposed an annual exchange without movement of teachers (Board Exhibit CW); the Master's report recommends a semiannual exchange of paired schools with a similar exchange assignment of teachers.

Subject to the limitations set forth on page 5 of this Court's Order of December 29, 1975, defendant may adopt either method. Certain elementary schools will be desegregated by zone change. Such zone changes as are recommended in the Master's report are hereby approved.

II HIGH SCHOOLS: The Master's report for desegregating high schools recommends a selection by students plus a random assignment where necessary (Master's report pp. 15-18). Defendant has suggested an assignment program by specific attendance districts (Board Exhibit CV). Subject to the limitations set forth on page 5 of this Court's Order of December 29, 1975, and subject further to the exception for high school juniors and seniors set forth on page 5 and 6 of such order, defendant may adopt either method of assignment.

III MISCELLANEOUS: The report of the Master dealing with "Handicapped and Special Education Program," "Magnet Schools," and "Magnet Programs for Grades 6, 7, and 8" are hereby adopted. Defendant's attention is directed again to the following portion of the order of December 29, 1975: "Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced. None is acceptable if not."

IV FURTHER PROPOSALS: No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

In any proposal for a change after this date, the Court will take into consideration the amount of "lead time" available prior to September 1, 1976. In the event the Court determines that a proposed change should be adopted but that insufficient time remains prior to September 1, 1976, such

improvement may be adopted effective to September 1, 1976, such improvement may be adopted effective September 1, 1977, or such other date as might appear appropriate at the time.

The following objections were raised by Defendant and are disposed of as follows:

1. Pupil assignment should be made by the central administration;
   GRANTED;

2. Pupil assignment should be made in the spring of 1976;
   GRANTED;

3. Transfer of elementary students should be made on a yearly rather than on a semester basis;
   GRANTED;

4. The Elementary School Plan should be a three-phase plan;
   REJECTED;

5. High School assignment should be on the basis of geographic zone rather than upon choice and random assignment;
   GRANTED;

THE FOREGOING BEING SUBJECT TO THE LIMITATIONS OF THIS COURT'S ORDER OF DECEMBER 29, 1975.

All other questions still remaining before the Court are hereby continued for further disposition.

APPROVED FOR ENTRY:

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

JOHN D. LYTER, CLERK
/s/ REBECCA J. ELLIS
Rebecca J. Ellis, Deputy

Dated at Dayton, Ohio, this
24th day of March, 1976.

L. DISTRICT COURT'S MAY 14, 1976 ORDER.

(Filed May 14, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3--75-304

MARK BRINKMAN, et al.,
Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,
Defendants.

ORDER

This matter is before the Court on the motion of defendant Dayton Board of Education dated May 11, 1976, to modify the Report of the Master. Such motion is in six branches. The first five branches of such motion refer to matters that appear to be within the limits of modification set forth by this Court in its Order of March 23, 1976. Such five branches are hereby GRANTED.

The request in branch no. 6 is not within the permissive changes in the Order of March 23, 1976 and such branch of motion is hereby DENIED.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

M. COURT OF APPEALS' JULY 26, 1976 ORDER.

Decided and Filed July 26, 1976

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-1854

MARK BRINKMAN, et al.,
Plaintiffs-Appellees,

v.

JOHN J. GILLIGAN and DAYTON BOARD OF EDUCATION, et al.,
Defendants-Appellants.

APPEAL from the United States District Court for the Southern District of Ohio.

Before: PHILLIPS, Chief Judge; PECK and LIVELY, Circuit Judges.

PER CURIAM. The Dayton, Ohio Board of Education (the Board) appeals from a judgment of the district court entered on March 25, 1976 which implemented its desegregation order and judgment of December 29, 1975. This court has considered two previous appeals in this litigation and our opinions are published at 503 F.2d 684 (1974) and 518 F.2d 853 (1975). This court concluded that the desegregation order

from which the second appeal was taken (by the plaintiffs) was inadequate and we remanded the case to the district court with specific instructions, as follows:

> On remand we direct that the court adopt a systemwide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976. 518 F.2d at 857.

After considering a plan proposed by the plaintiffs and one "submitted" but not "proposed" or "recommended" by the Board, the district court filed an order and a judgment on December 29, 1975. The judgment provided, in part, as follows:

> A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education*.
>
> Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such systems.

The judgment also permitted high school students already enrolled at a particular school to graduate from that school regardless of attendance zone boundaries. The judgment contained guidelines to be followed "wherever possible for elementary students":

> 1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
>
> 2. Students should be transported to the nearest available school.
>
> 3. No student should be transported for a period of

time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

Dr. John A. Finger, Jr. was appointed Master to establish attendance zones and a citizens board was authorized to monitor "the plan."

On March 15, 1976 the Master filed a report containing recommended desegregation plans for the elementary schools and the high schools of the Dayton system. The report contemplated achieving desegregation of the elementary schools by a combination of redefining attendance areas and the pairing of schools. Under the plan proposed for the high schools attendance zones would be the primary tool. In a judgment entered March 25, 1976 the district court adopted the portion of the Master's report dealing with the elementary schools and approved the Master's recommended zone changes. However, the Board was given the option of making annual exchanges between paired schools without a movement of teachers or semi-annual exchanges of both pupils and teachers as recommended by the Master. The judgment also permitted the Board to implement high school desegregation by employing an assignment program by specific attendance districts rather than following the Master's proposal of permitting school selection by students plus random assignments as necessary to achieve the mandated plus or minus 15% range. The court denied the Board's proposal for a three year phase-in of the elementary school plan.

The March 25 judgment contained this additional provision:

> IV FURTHER PROPOSALS: No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

On appeal the Board argues that the remedy ordered by the district court exceeds the scope of the violations. It is argued that the district court has adopted a fixed percentage formula to achieve racial balance in the Dayton schools contrary to the holding of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Board relies particularly upon the Court's statement that the constitutional requirement for school desegregation does not mean that "every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24.

This court has previously held that the practices of the Dayton school system constituted de jure segregation, citing *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973). *Brinkman, supra*, 518 F.2d at 854. Though this court ordered systemwide desegregation, the Board proposed no plan to achieve this mandate and made no showing of the existence of conditions related to the topography of the Dayton area, location of natural or artificial barriers, geographic isolation or similar considerations which might militate against an order requiring cross-district transportation of pupils. *Compare Goss* v. *Board of Education of Knoxville*, 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

The student composition of the Dayton school system is approximately 48% black and 52% white. Application of the district court's requirement that each school's ratio be within plus or minus 15% of the racial makeup of the system will permit black enrollments at particular schools to range between 33% and 63%. Rather than establishing a fixed mathematical requirement as the Board claims it does, this formula provides a flexible basis of pupil assignment similar to that approved by the Supreme Court in *Swann, supra*. The flexibility of the district court's judgment is further illustrated by the exemption of two entire grades of high school students, the provision for variations from the plus or minus 15% requirement "in exceptional circumstances" and the options

granted the Board which permitted it to choose alternate methods of achieving desegregation rather than being required to follow in every detail the plan submitted by the Master. We view the use of mathematical ratios in this case as no more than "a useful starting point" in shaping a remedy for past discrimination. *Swann, supra,* 402 U.S. at 25.

Our conclusions are in accord with those of other courts of appeals which since *Swann* have approved desegregation plans requiring system-wide adherence, within an established percentage range, to the student racial composition of the district. *See, e.g., Morgan* v. *Kerrigan,* 530 F.2d 401 (1st Cir.), *cert. denied,* 44 U.S.L.W. 3719 (U.S. June 10, 1976); *Harrington* v. *Colquitt County Board of Education,* 460 F.2d 193 (5th Cir.), *cert. denied,* 409 U.S. 915 (1972); *United States* v. *School District of Omaha,* 521 F.2d 530 (8th Cir.), *cert. denied,* 423 U.S. 946 (1975); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973); *Keyes* v. *School District No. 1, Denver,* 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976).

The Board also argues that the district court based its judgment on a misconception of the constitutional requirements for a unitary school system. In its order of December 29, 1975, which discussed the provisions contained in the separate judgment entered the same day, the district court wrote —

> . . . it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.

When considered out of context and read literally the quoted language does appear to create a right which the federal courts have never recognized. However, in the context of the order this statement appears to be nothing more than an affirmation that a system-wide desegregation plan must necessarily involve all the facilities of a school system and that pupil assignments will be made as required to eliminate the vestiges of

past discrimination without regard to the comparative quality of the various facilities. Be that as it may, the quoted language does not appear in the judgment, which is the instrument this court reviews on appeal.

At oral argument counsel for the Board contended that there is implicit in the judgment of the district court a requirement for periodic changes in the Dayton plan to maintain the required racial mix and that this violates the rule enunciated by the Supreme Court in *Pasadena City Board of Education* v. *Spangler,* —— U.S. ——, 44 U.S.L.W. 5114 (U.S. June 28, 1976). The short answer to this argument is that the judgment directs no changes after the 1976-77 school year. The district court did not adopt *in toto* the Master's report in which there was speculation about the necessity for future adjustments in the plan. The *Spangler* decision held that after Pasadena had established a unitary school system the district court could not require annual adjustments in attendance zones to prevent the development of racially identifiable schools within the system, where subsequent changes in the racial mix are caused by factors for which the school authorities could not be considered responsible. The judgment appealed from in the present case established the first constitutionally sufficient desegregation plan for the Dayton system. If adjustments to this plan are sought by any of the parties in future years the district court will necessarily consider the limitations of *Spangler* in dealing with such requests.

The judgment of the district court is affirmed.

N. OPINION OF SUPREME COURT

(Filed June 27, 1977)

SUPREME COURT OF THE UNITED STATES

No. 76-539

DAYTON BOARD OF EDUCATION ET AL., *Petitioners*,

v.

MARK BRINKMAN ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This school desegregation action comes to us after five years and two round trips through the lower federal courts.[1] Those

[1] This action was filed on April 17, 1972, by parents of black children attending schools operated by the defendant Dayton Board of Education. After an expedited hearing between November 13 and December 1, 1972, the District Court for the Southern District of Ohio, on February 1, 1973, rendered findings of fact and conclusions of law directing the formulation of a desegregation plan. App., at 1. On July 13, 1973, that court approved, with certain modifications, a plan proposed by the School Board. On appeal to the Court of Appeals for the Sixth Circuit, that court affirmed the findings of fact but reversed and remanded as to the proposed remedial plan. *Brinkman* v. *Gilligan*, 503 F. 2d 684 (CA6 1974).

The District Court then ordered the submission of new plans by the Board and by any other interested parties. App., at 70. On March 10, 1975, it rejected a plan proposed by the plaintiffs, and, with some modifications, approved the Board's plan as modified and expanded in an effort to comply with the Court of Appeals mandate. App., at 73. On

protracted proceedings have been devoted to the formulation of a remedy for actions of the Dayton Board of Education found to be in violation of the Equal Protection Clause of the Fourteenth Amendment. In the decision now under review, the Court of Appeals for the Sixth Circuit finally approved a plan involving districtwide racial distribution requirements, after rejecting two previous, less sweeping orders by the District Court. The plan required, beginning with the 1976-1977 school year, that the racial distribution of each school in the district be brought within 15% of the 48%-52% black-white population ratio of Dayton.[2] As finally formulated, the plan employed a variety of desegregation techniques, including the "pairing"[3] of schools, the redefinition of attendance zones, and a variety of centralized special programs and "magnet schools." We granted certiorari, — U.S. — (Jan.

appeal, the Court of Appeals again reversed as to remedy and directed that the District Court "adopt a system-wide plan for the 1976-1977 school year. . . ." *Brinkman* v. *Gilligan*, 518 F. 2d 853 (CA6 1975).

Upon this second remand, the District Court, on December 29, 1975, ordered formulation of the plan whose terms are developed below. App., at 99. On March 25, 1976, the details of the plan were approved by the District Court. App., at 110. In the decision now under review, the Court of Appeals affirmed. *Brinkman* v. *Gilligan*, 539 F. 2d 1084 (CA6 1976).

[2] The District Court said that it would deal on a case-by-case basis with failures to bring individual schools into compliance with this requirement. It also ordered that students already enrolled in the tenth and eleventh grades be allowed to finish in their present high schools, and announced the following "guidelines" to be followed "whenever possible" in the case of elementary school students:

"1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;

"2. Students should be transported to the nearest available school;

"3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter." App., at 104.

[3] "Pairing" is the designation of two or more schools with contrasting racial composition for an exchange program where a large proportion of the students in each school attend the paired school for some period. In the plan adopted by the District Court, it was the primary remedy used in the case of elementary schools.

17, 1976), to consider the propriety of this court-ordered remedy in light of the constitutional violations which were found by the courts below.

Whatever public notice this case has received as it wended its way from the United States District Court for the Southern District of Ohio to this Court has been due to the fact that it represented an effort by minority plaintiffs to obtain relief from alleged unconstitutional segregation of the Dayton public schools said to have resulted from actions by the respondent School Board. While we would by no means discount the importance of this aspect of the case, we think that the case is every bit as important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system.

Indeed, the importance of the judicial administration aspects of the case are heightened by the presence of the substantive issues on which it turns. The proper observance of the division of functions between the federal trial courts and the federal appellate courts is important in every case. It is especially important in a case such as this where the District Court for the Southern District of Ohio was not simply asked to render judgment in accordance with the law of Ohio in favor of one private party against another; it was asked by the plaintiffs, students in the public school system of a large city, to restructure the administration of that system.

There is no doubt that federal courts have authority to grant appropriate relief of this sort when constitutional violations on the part of school officials are proven. *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973); *Wright* v. *Council of City of Emporia,* 407 U. S. 451 (1972); *Swann* v. *Charlotte Mecklenburg Board of Education,* 402 U. S. 1 (1971). But our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley,* 418 U. S. 717, 741-742 (1974); *San Antonio School District* v. *Rodriguez,* 411 U. S. 1, 50 (1973); *Wright* v. *Council of City of Emporia, supra,* at 469.

It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles. Cf. *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976).

The lawsuit was begun in April 1972, and the District Court filed its original decision on February 7, 1973. The District Court first surveyed the past conduct of affairs by the Dayton School Board, and found "isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system."[4] It cited instances of physical segregation in the schools during the early decades of this century,[5] but concluded that "[b]oth by reason of the substantial time that had elapsed and because these practices have ceased, . . . the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy."

The District Court also found that as recently as the 1950s, faculty hiring had not been on a racially neutral basis, but that "by 1963, under a policy designated as one of 'dynamic gradualism,' at least one black teacher had been assigned to all eleven high schools and to 35 of the 66 schools in the entire system." It further found that by 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member. The Court's conclusion with respect to faculty hiring was that pursuant to a 1971 agreement with the Department of HEW, "the teaching staff

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[4] The court pointed out that since 1888, Ohio law as construed by its Supreme Court has forbidden separate public schools for black and white children. See Ohio Rev. Code § 3313.48; *Board of Education* v. *State,* 45 Ohio St. 555 (1888).

[5] "Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in the 1930's and 1940's and the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference." App., at 2-3 (footnote omitted).

of the Dayton public schools became and still remains substantially integrated."[6]

The District Court noted that Dunbar High School had been established in 1933 as a black high school, taught by black teachers and attended by black pupils. At the time of its creation there were no attendance zones in Dayton and students were permitted liberal transfers, so that attendance at Dunbar was voluntary. The court found that Dunbar continued to exist as a citywide all-black high school until it closed in 1962.

Turning to more recent operations of the Dayton public schools, the District Court found that the "great majority" of the 66 schools were imbalanced and that, with one exception,[7] the Dayton School Board had made no affirmative effort to achieve racial balance within those schools. But the court stated that there was no evidence of racial discrimination in the establishment or alteration of attendance boundaries or in the site selection and construction of new schools and school additions. It considered the use of optional attendance zones[8] within the District, and concluded that in the majority of cases the "optional zones had no racial significance at the time of their creation." It made a somewhat ambiguous finding as to the effect of some of the zones in the past,[9] and concluded that although none of the elementary optional

[6] The Court also considered employment of nonteaching personnel, and observed that blacks made up a proportion of the nonteaching, nonadministrative personnel equal to the proportion of black students in the District, though in certain ocupations they were represented at a substantially lower rate.

[7] The court noted that a concerted effort had been made in the past few years to enroll more black students at the Patterson Co-op High School.

[8] An optional zone is an area between two attendance zones, the student residents of which are free to choose which of the two schools they wish to attend.

[9] The District Court found that three high school optional zones "may have" had racial significance at the time of their creation.

school attendance zones today "have any significant potential effects in terms of increased racial separation." The same cannot be said of the high school optional zones. Two zones in particular, "those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past."[10]

The court found no evidence that the District's "freedom of enrollment" policy had "been unfairly operated or that black students [had] been denied transfers because of their race." Finally the court considered action by a newly elected Board on January 3, 1972, rescinding resolutions, passed by the previous Board, which had acknowledged a role played by the Board in the creation of segregative racial patterns and had called for various types of remedial measures. The District Court's ultimate conclusion was that the "racially imbalanced schools, optional attendance zones, and recent Board action . . . are cumulatively a violation of the Equal Protection Clause."

The District Court's use of the phrase "cumulative violation" is unfortunately not free from ambiguity. Treated most favorably to the respondents, it may be said to represent the District Court's opinion that there were three separate although relatively isolated instances of unconstitutional action on the part of petitioners. Treated most favorably to the petitioners, however, they must be viewed in quite a different light. The finding that the pupil population in the various Dayton schools is not homogeneous standing by itself, is not a violation of the Fourteenth Amendment in the absence of

[10] The following information about those zones is contained in an appendix to the District Court opinion:

High Schools	Date of Creation	% black population At date af creation	1972-73
Roosevelt/	1951	31.5	100.0
Colonel White	(Extended 1958)	0.0	54.6
Kiser/	1962	2.7	9.8
Colonel White		1.1	54.6

a showing that this condition resulted from intentionally segregative actions on the part of the Board. *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). The District Court's finding as to the effect of the optional attendance zones for the three Dayton high schools, assuming that it was a violation under the standards of *Washington* v. *Davis*, *supra*, appears to be so only with respect to high school districting. *Swann*, *supra*, at 15. The District Court's conclusion that the Board's recision of previously adopted school board resolutions was itself a constitutional violation is also of questionable validity.

The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. We agree with the Court of Appeals' treatment of this action, wherein the court said:

> "The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf. *Hunter* v. *Erickson*, 393 U.S. 385 (1960); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution." 503 F. 2d 684, 697.

Judged most favorably to the petitioners, then, the District Court's findings of constitutional violations did not, under our cases, suffice to justify the remedy imposed. Nor is light cast upon the District Court's finding by its repeated use of the

phrase "cumulative violation." We realize, of course, that the task of factfinding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multimembered public bodies are of necessity difficult, cf. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 L. W. 4073 (Jan. 11, 1973), and the question of whether demographic changes resulting in racial concentration occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.

We think it accurate to say that the District Court's formulation of a remedy on the basis of the three part "cumulative violation" was certainly not based on an unduly cautious understanding of its authority in such a situation. The remedy which it originally propounded in light of these findings of fact included requirements that optional attendance zones be eliminated, and that faculty assignment practices and hiring policies with respect to classified personnel be tailored to achieve representative racial distribution in all schools.[11] The one portion of the remedial plan submitted by the

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[11] The District Court's first plan also contained the following provisions:

(V) Establishment of four city-wide elementary science centers the enrollment of which would approximate the existing black-white ratio of students in the system;

(VI) Combination of two high schools into a unified cooperative school with district-wide attendance areas;

(VII) Formation of elementary and high school all-city bands, orchestras and choruses;

(VIII) Provisions for scheduling of integrated athletics;

(IX) Establishment of a minority language program for education of staff;

(X) Utilization of the Living Arts Center for inter-racial experiences in art, creative writing, dance and drama;

(XI) Creation of centers for rumor control, school guidance and area learning. See App., at 35-36.

School Board which the District Court refused to accept without change was that which dealt with so-called "freedom of enrollment priorities." The court ordered that, as applied to high schools, new students at each school be chosen at random from those wishing to attend.[12] The Board was required to furnish transportation for all students who chose to attend a high school outside the attendance area of their residence.

Both the plaintiffs and the defendant School Board appealed the order of the District Court to the United States Court of Appeals for the Sixth Circuit. 503 F. 2d 684. That court considered at somewhat greater length than had the District Court both the historical instances of alleged racial discrimination by the Dayton School Board and the circumstances surrounding the adoption of the Board's resolutions and the subsequent recission of those resolutions. This consideration was in a purely descriptive vein: no findings of fact made by the District Court were reversed as having been clearly erroneous, and the Court of Appeals engaged in no factfinding of its own based on evidence adduced before the District Court. The Court of Appeals then focused on the District Court's finding of a three-part "cumulative" constitutional violation consisting of racially imbalanced schools, optional attendance zones, and the recision of the Board resolutions. It found these to be "amply supported by the evidence."

Plaintiffs in the District Court, respondents here, had cross-appealed from the order of the District Court, contending that the District Court had erred in failing to make further findings tending to show segregative actions on the part of the Dayton School Board, but the Court of Appeals found it unnecessary to pass on these contentions. The Court of Appeals also stated that it was unnecessary to "pass on the

[12] The court thus eliminated a provision within the Board plan which gave first priority to students residing within the school's attendance zone.

question of whether the rescission [of the Board resolutions] by itself was a violation of" constitutional rights. It did discuss at length what is described as "serious questions" as to whether Board conduct relating to staff assignment, school construction, grade structure and reorganization, and transfers and transportation, should have been included within the "cumulative violation" found by the District Court. But it did no more than discuss these questions; it neither upset the factual findings of the District Court nor did it reverse the District Court's conclusions of law.

Thus the Court of Appeals, over and above its historical discussion of the Dayton school situation, dealt with and upheld only the three-part "cumulative violation" found by the District Court. But it nonetheless reversed the District Court's approval of the school board plan as modified by the District Court, because the Court of Appeals concluded that "the remedy ordered . . . is inadequate, considering the scope of the cumulative violations." While it did not discuss the specifics of any plan to be adopted on remand, it repeated the admonition that the court's duty is to eliminate "all vestiges of state-imposed school segregation." *Keyes, supra,* at 202; *Swann, supra,* at 15.

Viewing the findings of the District Court as to the three-part "cumulative violation" in the strongest light for the respondents, the Court of Appeals simply had no warrant in our cases for imposing the systemwide remedy which it apparently did. There had been no showing that such a remedy was necessary to "eliminate all vestiges of the state-imposed school segregation." It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution. *Spencer* v. *Kugler,* 404 U. S. 1027 (1972); *Swann, supra,* at 24. The Court of Appeals seems to have viewed the present structure of the Dayton school system as a sort of "fruit of the poisonous tree,"

since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregative action found by the District Court. But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope.

On appeal, the task of a Court of Appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the District Court are clearly erroneous, it may reverse them under Fed. Rules Civ. Proc. 52(b). If it decides that the District Court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Here, however, as we conceive the situation, the Court of Appeals did neither. It was vaguely dissatisfied with the limited character of the remedy which the District Court had afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the District Court's findings of fact or reversing its conclusions of law.

The Court of Appeals did not actually specify a remedy, but did, in increasingly strong language in subsequent opinions require that any plan eliminate systemwide patterns of one-race schools predominant in the district. 518 F. 2d 853, 855. In the face of this commandment, the District Court, after twice being reversed, observed:

> "This court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system. Based upon the plans of both the plaintiff and defendant the assumption must be that the transportation of approximately 15,000 students on a regular and permanent basis will be required."

We think that the District Court would have been insensitive indeed to the nuances of the repeated reversals of its orders by the Court of Appeals had it not reached this conclusion. In effect, the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the District Court, taking those findings of violations in the light most favorable to respondents.

This is not to say that the last word has been spoken as to the correctness of the District Court's findings as to unconstitutionally segregative actions on the part of the petitioners. As we have noted, respondents appealed from the initial decision and order of the District Court, asserting that additional violations should have been found by that court. The Court of Appeals found it unnecessary to pass upon the respondents' contentions in its first decision, and respondents have not cross-petitioned for certiorari from decision of the Court of Appeals in this Court. Nonetheless, they are entitled under our precedents to urge any grounds which would lend support to the judgment below, and we thing that their contentions of unconstitutionally segregative actions, in addition to those found as fact by the District Court, fall into this category. In view of the confusion at various stages in this case, evident from the opinions both of the Court of Appeals and the District Court, as to the applicable principles and appropriate relief, the case must be remanded to the District Court for the making of more specific findings and, if necessary, the taking of additional evidence.

If the only deficiency in the record before us were the failure of the Court of Appeals to pass on respondents' assignments of error respecting the initial rulings of the District Court, it would be appropriate to remand the case to that court. But we think it evident that supplementation of the record will be necessary. Apart from what has been said above with respect to the use of the ambiguous phrase "cumulative violation" by both courts, the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed requires supplementation of the record and additional

findings addressed specifically to the scope of the remedy. It is clear that the presently mandated remedy cannot stand upon the basis of the violations found by the District Court.

The District Court, in the first instance, subject to review by the Court of Appeals, must make new findings and conclusions as to violations in the light of this opinion, *Washington* v. *Davis, supra,* and *Village of Arlington Heights, supra.* It must then fashion a remedy in the light of the rule laid down in *Swann, supra,* and elaborated upon in *Hills* v. *Gautreaux,* 425 U. S. 284 (1976). The power of the federal courts to restructure the operation of local and state governmental entities "is not plenary. It 'may be exercised only on the basis of a constitutional violation.' [*Milliken* v. *Bradley*], 418 U. S., at 738, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16. See *Rizzo* v. *Goode,* 423 U. S. 362, 377. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation.' 418 U. S., at 744; *Swann, supra,* at 16." *Hills, supra,* at 294. See also *Austin Independent School Dist.* v. *United States,* — U. S. — (1976) (MR. JUSTICE POWELL, concurring).

The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington* v. *Davis, supra.* All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how must incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional

violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes, supra,* at 213.

We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as "cumulative violation" than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

While we have found that the plan implicitly, if not explicitly, imposed by the Court of Appeals was erroneous on the present state of the record, it is undisputed that it has been in effect in the Dayton school system during the present year without creating serious problems. While a school board and a school constituency which attempt to comply with a plan to the best of their ability should not be penalized, we think that the plan finally adopted by the District Court should remain in effect for the coming school year subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion.

The judgment of the Court of Appeals is vacated, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 76-539

DAYTON BOARD OF EDUCATION ET AL., *Petitioners*, v. MARK BRINKMAN ET AL. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 27, 1977]

MR. JUSTICE STEVENS, concurring.

With the caveat that the relevant finding of intent in a case of this kind necessarily depends primarily on objective evidence concerning the effect of the Board's action, rather than the subjective motivation of one or more members of the Board, see *Washington* v. *Davis*, 426 U. S. 229, 253-254 (STEVENS, J., concurring), I join the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 76-539

DAYTON BOARD OF EDUCATION ET AL., *Petitioners*, v. MARK BRINKMAN ET AL. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 27, 1977]

MR. JUSTICE BRENNAN, concurring in the judgment.

The Court today reaffirms the authority of the federal courts "to grant appropriate relief of this sort [i.e., busing] when constitutional violations on the part of school officials are proven. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973) . . . ." *Ante*, at 3. In this case, however, the violations actually found by the District Court were not sufficient to justify the remedy imposed. Indeed, none of the parties contends otherwise. Respondents nowhere argue that the three "cumulative violations" should by themselves be sufficient to support the comprehensive, systemwide busing order imposed. Instead, they urge us to find that other, additional actions by the school board appearing in the record should be used to support the result. The United States, as *amicus curiae*, concedes that the "three-part 'cumulative' violation found by the district court does not support its remedial order," Brief at 21, and also urges us to affirm the busing order by resort to other, additional evidence in the record. Under this circumstance, I agree

with the result reached by the Court. I do so because it is clear from the holding in this case, and that in *Milliken* v. *Bradley*, — U. S. —, — (1977), also decided today, that the "broad and flexible equity powers" of district courts to remedy unlawful school segregation continue unimpaired.

This case thus does not turn upon any doubt of power in the federal courts to remedy state-imposed segregation. Rather, as the Court points out, it turns upon the "proper allocation of functions between the district courts and the courts of appeals within the federal judicial system." *Ante*, at 3. As the Court recognizes, the task of the district courts and courts of appeals is a particularly difficult one in school desegregation cases, *ante*, at 14. Although the efforts of both the District Court and the Court of Appeals in this protracted litigation deserve our commendation, it is plain that the proceedings in the two courts resulted in a remedy going beyond the violations so far found.

On remand, the task of the District Court, subject to review by the Court of Appeals, will be to make further findings of fact from evidence already in the record, and, if appropriate as supplemented by additional evidence. The additional facts, combined with those upon which the violations already found are based, must then be evaluated to determine what relief is appropriate to remedy the resulting unconstitutional segregation. In making this determination, the courts of course "need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a long-standing segregated system." *Milliken* v. *Bradley*, *supra*, at —.

Although the three violations already found are not of themselves sufficient to support the broad remedial order entered below, this is not to say that the three violations are insignificant. While they are not sufficient to justify the remedy imposed when considered solely as unconstitutional *actions*, they clearly are very significant as indicia of *intent* on the part of the school board. As we emphasized in *Keyes*, *supra*, at 207, "Plainly, a finding of intentional

segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system." Once segregative intent is found, the District Court may more readily conclude that not only blatant, but also subtle actions—and in some circumstances even inaction—justify a finding of unconstitutional segregation that must be redressed by a remedial busing order such as that imposed in this case.

If it is determined on remand that the school board's unconstitutional actions had a "systemwide impact," then the court should order a "systemwide remedy." *Ante*, at 14. Under *Keyes*, once a school board's actions have created a segregated dual school system, then the school board "has the affirmative duty to desegregate the entire system 'root and branch.' " 413 U.S., at 213. Or, as stated by the Court today in *Milliken*, the school board must "take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.' " *Supra*, at —, quoting *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U. S. 1, 15 (1971). A judicial decree to accomplish this result must be formulated with great sensitivity to the practicalities of the situation, without ever losing sight of the paramount importance of the constitutional rights being enforced. The District Court must be mindful not only of its "authority to grant appropriate relief," *ante*, at 3, but also of its duty to remedy fully those constitutional violations it finds. It should be flexible but unflinching in its use of its equitable powers, always conscious that it is the rights of individual school children that are at stake, and that it is the constitutional right to equal treatment for all races that is being protected.

O. FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DISTRICT COURT

(Filed December 15, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-75-304

MARK BRINKMAN, ET AL.,
Plaintiffs,

v.

JOHN J. GILLIGAN, ET AL.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

INTRODUCTION

This matter is once again before the Court pursuant to the mandate of the Supreme Court of the United States. The nature of that mandate is such that although five years and four appeals have intervened, all evidence presented must be reexamined in light of a standard enunciated by the Supreme Court, and plaintiffs' cause of action must be reconsidered *ab initio*.

In accordance with instructions of the Supreme Court[1]

[1] "All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate." Dayton Board of Education v. Brinkman, —— U.S. —— (1977), Slip Opinion at page 13.

an evidentiary hearing commenced November 1, 1977. Plaintiffs were given an opportunity to enlarge upon the existing record by the presentation of additional evidence and testimony. Eleven witnesses were called during four days of testimony. Following the hearing the Court re-examined in full the record developed at the initial hearing of this matter in November, 1972.

The course of this protracted litigation has been marked by conceptual differences not only as to the facts, but as to the legal significance of those facts. If the passage of five years has moved us no closer to a resolution of this case, it has finally produced a more precise framework by which violations and remedial measures under the Equal Protection Clause of the Fourteenth Amendment may be determined.

The Court finds it essential to describe this framework at the outset of this Order in order that the Findings of Fact may be evaluated by the appropriate legal principles.

Prior to 1976 there was support for the proposition that a violation of the Equal Protection Clause could be proved by a mere showing that actions of state officials had a segregative or discriminatory effect, regardless of their intent. *See Kennedy Park Homes Association* v. *Lackawanna,* 436 F.2d 108, 114 (2d Cir. 1970) *cert. denied* 401 U.S. 1010 (1971); *Hawkins* v. *Town of Shaw,* 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc,* 461 F.2d 1171 (1972).[2]

Recognizing that some of the language in the earlier cases (particularly *Palmer* v. *Thompson,* 403 U.S. 217 (1971), and *Wright* v. *Council of the City of Emporia,*

[2] This clearly was plaintiffs' view in their pretrial brief filed prior to the first hearing in this case: ". . . The law of the land with respect to school cases now is clearly not the intent but rather the effect of 'state action.'"
Pretrial Brief, filed November 3, 1972 at page 20.

407 U.S. 451 (1972)), might have led to this conclusion, the Supreme Court in *Washington* v. *Davis,* 426 U.S. 229 (1976), stated that "to the extent that those cases rested on or expressed a view that proof of discriminatory racial purpose is necessary in making out an equal protection violation, we are in disagreement." *Washington* v. *Davis, supra* at 245.

In regard to school desegregation cases, the Court also noted that: "The invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause." 426 U.S. at 240. The Court reaffirmed this principle *sub silentio* by its summary remand in *Austin Independent School District* v. *United States,* 429 U.S. 990 (1976).

While discriminatory effect may be relevant to a determination of segregative intent, it is conclusive on this question only in the rarest of circumstances. *See, e.g., Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960).

In *Arlington Heights* v. *Metropolitan Housing Development Corporation,* 429 U.S. 252, 267 (1977), the Court enumerated other factors which might be relevant to the question of segregative intent:

> [1] The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes . . . .
>
> [2] The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purpose . . . .
>
> [3] Departures from the normal procedural sequence

> also might afford evidence that improper purposes are playing a role . . . .
>
> [4] The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes of its meetings, or reports.

Given the Court's decision in *Davis, Austin* and *Arlington Heights* as a predicate, the return of this case for reexamination was inevitable. The original decision of February, 1973 lacked the guidance of the 1976 determinations.

The Supreme Court first reviewed the substance of this Court's finding of "cumulative violations", a term which it found to be "not free from ambiguity". It noted that this Court's finding of racial imbalance in a substantial portion of the schools does not constitute "a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board".[3]

It also found that the effect of optional zones pertained only to high schools, and that the rescission of certain Board resolutions to desegregate the system had significance only if there was a constitutional duty to desegregate *ab initio.* The Court then concluded that "Judged most favorably to the petitioners, . . . the District Court's finding of constitutional violation did not, under our cases, suffice to justify the remedy imposed."[4]

The Court remanded the case to this Court with the following directions:

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[3] Dayton Board of Education v. Brinkman, supra, Slip Opinion at page 6.

[4] Supra — Slip Opinion at page 7.

> The duty of both the District Court and the Court of Appeals in a case such as this where mandatory segregation by law of the races in the schools has long since ceased[5] is to first determine whether there was any action in the conduct of the business of the school board which was intended to and did in fact discriminate against minority pupils, teachers or staff . . . . If such violations are found the District Court . . . must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted when that distribution is compared to what it would have been in the absence of such constitutional violation. The remedy must be designated to redress that difference and only if there has been a system-wide impact may there by a system-wide remedy.

While the requirement of segregative intent is not new to school desegregation cases (*Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 208 (1973)), the concept of incremental segregative effect is. As explained by the Supreme Court, it stands as a more precise formulation of the principle that "the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation." *Austin Independent School District* v. *United States,* 429 U.S. 990, 995 (1976) (Powell, J. concurring).

We read this language as imposing a burden upon the plaintiffs to prove the effect of any purposeful segregative act, not merely on a theoretical basis, but on a factual basis. The necessity for such burden may be found in the following statement by Justice Powell:

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[5] It is not clear from the above statement whether such duty would differ in states where mandatory segregation has only recently been abolished. Such a distinction might reduce the precedential assistance now available to district courts.

> The individual interests at issue here are as personal and important as any in our society. They relate to the family, and to the concern of parents for the welfare and education of their children, especially those of tender age. Families share those interests wholly without regard to race, ethnic origin or economic status. It also is to be remembered in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action, but, rather, upon innocent children and parents. *Austin, supra,* 429 U.S. at 995, footnote 7.

Consistent with the admonitions of the Supreme Court, a full review of all evidence and testimony has been undertaken. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the Court submits its Findings of Fact and Conclusions of Law.

II

HISTORICAL PERSPECTIVE

A. Since shortly after the 1913 flood, Dayton's black population has centered almost exclusively on the West Side of Dayton. (T.R.1-623)[6] Since that time this population has moved steadily north and west. (Defendant's Exhibit BY) Without question the prime factor in this concentration has been housing discrimination, both in the private and public sector. Until recently, realtors avoided showing black people houses which were located in predominantly white neighborhoods. (T.R.1 2040-2055) In the 1940's, public housing was strictly segregated

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[6] For purposes of clarity the record produced at the hearings in November, 1972 will be identified as "T.R. 1" and the record produced at the hearings in November, 1977 will be identified as "T.R. 2."

according to race. (T.R.1 182-186) This segregated housing pattern has had a concomitant impact upon the composition of the Dayton public schools. (T.R.2 – 380, 382 – Robert Rice)

B. There is little dispute between the parties concerning early practices of the Dayton school system in its treatment of black students. *See* Request for Admissions filed October 16, 1972 and Answers to Plaintiff's Requests for Admissions filed October 26, 1972. Many of those practices, if they existed today, would violate the Equal Protection Clause. Among them are the following:

1. Between approximately 1910 and 1920, black elementary children were taught in separate and inadequate facilities located in the back of Garfield School. (T.R.1 – 619-623 – Ella Lowrey)

   In the 1920's black children were moved into the main brick building. However, two to three times as many black children as white children were assigned to a classroom.

   These practices continued until approximately 1934. At that time only two white children were left in the main building. The white teachers were all reassigned, and the school became all black with black teachers and a black principal.

2. Until approximately 1950 the athletic programs in the high schools were substantially segregated. Blacks were required to use separate locker rooms. (T.R.1 – 532) Black athletic teams were not permitted to participate with white teams until 1948. (T.R.1 – 482, 569, 608) At Steele High School during the 1930's blacks were not permitted to use the school swimming pool, (T.R.1 – 2013, 2014), and at Roosevelt High School a separate swimming pool was set aside for blacks. (T.R.1 – 481, 532)

3. Two witnesses have suggested that black students were either encouraged or required to sit at the rear of classes at Roosevelt High School until approximately 1950. (T.R. – 505, 572) Black high school students were counseled exclusively by black counselors, (T.R.1 – 609-610), and were discouraged from taking college preparatory courses due to the lack of job opportunities for blacks. (T.R.1 – 480).

We found these incidents of purposeful segregation to be "at least inhumane and by present standards reprehensible". (Findings of Fact and Memorandum Opinion of Law February 7, 1973, at page 3) While they evidence an inexcusable history of mistreatment of black students, no evidence has been presented by the plaintiffs to show that "the segregation resulting from those acts continues to exist". *Keyes, supra* at 210. In the absence of evidence showing their effect on "the racial distribution of the Dayton school population as presently constituted", plaintiffs have failed to meet the remedial portion of their burden of proof.

III

RACIAL IMBALANCE

As this Court noted in 1973, "the great majority of all schools in the Dayton system are racially imbalanced . . .". (Findings of Fact and Memorandum Opinion of Law – February 7, 1973 at page 5) Indeed, in 1971-72 51 of the some 69 schools in the system were virtually all-white or

all-black. (Plaintiffs' Exhibit 100B) The evidence disclosed an acceleration of this phenomenon between 1959 and 1970. (T.R.1 – 548, 836) During this same period of time whites were fleeing from Dayton's West Side. (T.R.1 – 551) Between 1951 and 1972 the percentage of blacks in the school system went from approximately 18% to 45%. (Plaintiffs' Exhibit 100E; Defendants' Exhibit CU)

Both Mr. Robert French, Superintendent of Schools from 1947 to 1958, and Mr. Ralph D. Curk, former Director of Research for the system, noted that with one exception (termed the West Side Reorganization discussed herein at pages 12-13), no attempt was made to alter the racial characteristics of any of the schools. (French Deposition at page 42, Curk Deposition at pages 47-48; 52)

Contrary to the opinion of many of plaintiffs' witnesses (T.R.1 – 1684, T.R.2 – 159-161), the failure of school officials to take affirmative steps to alleviate this racial imbalance does not become actionable under the Equal Protection Clause unless the imbalance was precipitated by their own intentionally segregative acts.

While the Supreme Court has deemed racial imbalance in the schools an important indicia of a system in which intentional acts of segregation may have occurred, *Swann* v. *Charlotte-Mecklenburg,* 402 U.S. 1 (1971), such imbalance alone does not establish a Fourteenth Amendment violation. *Dayton Board of Education* v. *Brinkman,* Slip Opinion at page 6. It can only be viewed in the context of evidence of intentionally segregative actions by the Board.

III

FACULTY ASSIGNMENT AND HIRING

After a second perusal of the transcripts, depositions, and exhibits in this case, the Court considers the description in its 1973 Order concerning the three-phase policy on faculty hiring and assignment[7] to be substantially accurate. Those findings will be expanded here.

A. During the 1930's, black teachers were hired only as they were needed to teach black children. (T.R.1 – 619-642)

B. The black population of the city increased during the 1940's and concomitantly more black teachers were hired. As this Court noted in its previous Order: "There is no direct evidence that black teachers were forbidden to teach white children at any school . . .". (Order of February 7, 1973 at page 3). *See* Appendix A.

There is evidence that in 1950 there were no black teachers teaching white students in any school in the system. (T.R.1 – 235) Whites were hired to fill vacancies in white or integrated schools, and blacks were hired only to teach in black schools. (T.R.1 – 233-234)

Mr. French noted that while there was pressure from black community leaders to hire black teachers at this time, "[n]othing was ever said about the placement of black teachers. There was no demand for the placement of black teachers". (French Deposition at page 53)

C. Beginning in 1951 however, the entire Board of Education, one of whose members was black, reached an un-

[7] See Findings of Fact and Memorandum Opinion of Law, February, 1973 at pages 3-4.

written understanding that this segregative placement policy should be phased out. The substance of the new policy of integration, known as "dynamic gradualism", was that "we will move as fast as we can move tactfully, without creating polarization". (T.R.1 – 281)

D. Although remnants of the old policy, such as discouraging black teachers from going to all white schools (T.R.1 – 317; 1005-1006), and assigning black substitute teachers to black schools (T.R.1 – 402-403), did continue to appear after 1960, the policy of dynamic gradualism was substantially implemented during the 1950's and 1960's.

In 1951 a black teacher was assigned to teach in an integrated classroom for the first time. (T.R.1 – 237) By 1963 there was at least one black faculty member in each of the high schools, and there were black faculty members in 44 of the 64 schools in the system. (Plaintiffs' Exhibit 130C) By 1969 each school had at least one black faculty member, many of the faculties were totally integrated (Defendant's Exhibit AN), and there was at least one black athletic coach in seven of the eleven high schools. (Defendants' Exhibit AP) Indeed by 1969 the Dayton school system had the most black educators and the second highest percentage (29.4%) of black educators of the twenty largest systems in the State of Ohio. (Defendants' Exhibit AQ) In addition, the administrative staff was keeping pace with this trend. (Defendant's Exhibits AK, AN, AL)

E. In March of 1969 after a Title VI Compliance Review, the Office of Civil Rights of the United States Department of Health, Education and Welfare determined that the Dayton school system was in noncompliance as to its assignment of professional staff. After a meeting with HEW officials, the Board issued a resolution to desegregate the faculty by September of 1971. Each school would be required to reflect the racial balance of the district as a whole. (T.R.1 – 988; Plaintiff's Exhibit 11F)

As the figures contained in Plaintiff's Exhibit 1002 (pages 65, 66) indicate, the Board substantially fulfilled this commitment by the 1971-72 school year. (T.R.1 – 1276)

F. The Court finds that until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative. Despite the policy of dynamic gradualism, vestiges of the Board's earlier illegal practices were evident until approximately 1963. But by 1969 all traces of segregation were virtually eliminated. The racial quota imposed upon the Board by HEW in 1969 edged the legal limit in requiring racial balance in all of the schools of the system. *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18-24 (1972). By 1972 the system had reached an appropriate racial balance in faculty assignment. No further action by the United States District Court was required.

G. The incremental segregative effect of the Board's earlier policy must now be addressed. Many of plaintiffs' witnesses asserted that the placing of black teachers in all-black schools had the effect of identifying that school as being black, thus impacting black children into black schools. (T.R.1 – 365-369; 410-414; T.R.2 – 33; 435) According to the plaintiffs, this racial identifiability continued even after the faculty was desegregated. (T.R.1 – 433; 1533-35; T.R. 2 – 33-34)

The Court believes the evidence to be to the contrary. In every specific instance brought to the Court's attention in which black faculty were assigned to black schools, the school was already identifiable as being black because of the racial population of the students.

In 1957 this was true of Weaver, Miami Chapel, Highview, Garfield, Wogaman, and Willard. (T.R.1 – 1489; Plaintiffs' Exhibit 130B) It was true when Garfield and Willard were closed and the students in those two all-black schools were sent to McFarlane in 1962 (T.R.1 – 539), and it was true of Jackson and Westwood in 1960. (T.R.1 – 364-365; 538)

In integrated schools such as Edison, Central, Drexel, Jane Adams, Irving, Jackson, Whittier, and Roosevelt High School, where the faculties had been all-white, racial identifiability did not turn on the assignment of one to four black teachers to staffs ranging in size from 20 to 60. *See* Plaintiffs' Exhibit 29, 130B; Defendant's Exhibit AU)

Dr. Wayne Carle, District Superintendent from 1968 to 1972, was compelled to agree that if these schools were racially identifiable, it was because of their student composition, not because of their faculties. (T.R.2 – 266-267)

Assuming *arguendo* that faculty desegregation could not eliminate the racial identifiability of a school in 1972, the Court finds difficulty in understanding how an integrated faculty in all-black schools in the 1950's and 1960's could have significantly affected the identifiability of such schools.

The Court finds that the predominant factor in racial identifiability of schools is the pupil population, not the composition of the faculty of the school. (T.R.1 – 367-368; T.R.2 – 256-257) The effects of placing black faculty in schools which were already identifiably black were not significant in terms of the racial distribution of the Dayton school population as it existed in 1972.

A preponderance of the evidence does not show an incremental segregative effect of the Board's policy of hiring and assignment of teachers.

IV

ATTENDANCE ZONES

A. Since 1952 the Dayton school system has operated on a strict attendance zone system of assignment. With few exceptions these zones have not been altered since 1952. (T.R.1 – 1482; 1590; T.R.2 – 265-266) For the most part Dayton's schools are "walk-ins" and are located close to the center of their attendance zones. The attendance zones themselves are geographically compact. (T.R.1 – 1556-1562) No evidence has been presented suggesting that attendance zones were redrawn to promote segregation.

B. The evidence discloses three major boundary changes since 1951, exclusive of boundary changes for new schools:

1. The West Side Reorganization

Unlike many actions of the Board, there is little dispute among the parties and witnesses that this reorganization was an experiment in integration, and was intended as such. Its purpose was to enable black students to go to an integrated rather than an all-black school if they chose to do so. (French Deposition at page 39; Curk Deposition at page 61; T.R.1 – 978-981; 1501; T.R. 2 – 151-155)

The substance of reorganization was as follows: In 1951 the Board had before it two alternative plans for redrawing elementary attendance zones in the West Side. Plan A contemplated slight alterations to the attendance zones and additions to the all-black Garfield and Willard schools. Plan B contemplated shrinking the district of all-black Wogaman School and expanding the attendance boundaries of Jackson (35.9% black) and Weaver (67.6% black). All-black

Garfield School's boundaries were also to be diminished and the boundaries of Edison (43% black) and Irving (46.6% black) were to be expanded.

In conjunction with Plan B, six optional zones were established between 1952 and 1953. They are as follows:

Willard	Irving	Whittier	Willard
100% Black 1951	46.6% Black 1951	29.9% Black 1951	100% Black 1951
Whittier	Miami Chapel	Wogaman	Highview
29.9% Black 1951	100% Black 1953	100% Black 1951	1.7% Black 1951
Edison	Jefferson	Jackson	Westwood
43% Black 1951	0% Black 1951	35.9% Black 1951	0% Black 1951

(T.R.1 — 1457-1458; 1486; 1663-1674)

After being apprised of these alternative plans for action, leaders from the West Side community opted for Plan B. The Board of Education approved Plan B in December of 1952. (T.R.1 — 1873-1874)

The experiment was in fact a failure. Within three years the integrated schools involved in the plan became predominantly black. No other attempt was ever made to alter attendance boundaries for the purpose of integration. (French Deposition at 39-40; T.R.1 — 1500)

The plaintiffs have gone to great lengths in describing the segregative effects of this plan. Dr. Gordon Foster described the situation as "essentially one of diddling around piecemeal with desegregation . . . ." (T.R.1 — 1501) The only alternative which Dr. Foster suggested was to transport children out of or into the area. (T.R.1 — 1505)

Whatever the effects of this reorganization may have been, its purpose was clearly integrative rather than segregative. Lack of success in an innovative plan intended to advance integration is not synonymous with segregative intent.

A preponderance of the evidence does not show a segregative intent as to the West Side Reorganization.

2. The Stivers Boundary Change

The redrawing of this attendance zone was necessitated by the construction of Highway 35. No question has been raised as to its intent, and its effect was integrative. (T.R.1 — 1255-1257; 1592-1593)

3. The Middle Schools

In 1971 the Board of Education altered the traditional K through 8, 9 through 12 grade structure by establishing five middle schools. (T.R.1 — 1306-1307) A child would attend K through 5 in an elementary school, 6 through 8 at a middle school, and 9 through 12 at a high school. The feeder elementary schools were those in the closest proximity to middle schools. (T.R.1 — 1308-1309)

There is evidence both that the middle schools had a segregative effect and an integrative effect. (T.R.1 – 1308; 1538) There is no evidence to indicate that the schools were established with the purpose of segregating students.

A preponderance of the evidence has not shown a segregative intent in the establishment of middle schools.

C. Prior to 1950 the attendance zone system of assignment was so loosely operated that a student had little difficulty transferring to a school outside his zone. (French Deposition at page 17) While the attendance zone policy was more strictly enforced after 1950, there were exceptions to this policy. For purposes of symmetry only, the Court has grouped them into two catagories: Miscellaneous Transfers and Optional Zones.

1. Miscellaneous Transfers

A. Shawen Acres

From the 1930's until the early 1950's black children from Shawen Acres Orphanage were sent to the all-black Garfield School, located in a distant part of the city. (T.R.1 – 476-477; 511; 1230-1237) The schools surrounding Shawen Acres were at that time virtually all-white. School administrators asserted that if black children were sent to these schools, they would immediately be perceived as from an orphanage and would be ostracized by their peers. (Curk Deposition page 54-57)

After approximately 1950 these children were reassigned to Loos, Van Cleve, Brown and Shiloh

Schools, all of which were predominantly white. (T.R.1 – 511)

While arguably this might be termed a purposeful segregative act, the plaintiffs have failed to offer any objective proof as to its incremental segregative effect on the racial distribution of the school population.

B. The Opening of McFarlane School

In 1962 the new Dunbar High School was opened and the old Dunbar High School became McFarlane Elementary School. Willard and Garfield which respectively were two blocks away and four blocks away were closed and their students were transferred to McFarlane. (T.R.1 – 1653)

Plaintiffs argue that the closing of these two all-black schools and the creation of a new one constituted a purposeful segregative act. If there had been an all-white school or integrated school in close proximity to McFarlane, as was the case with Barrett and Stedman Schools in *Keyes* v. *School District No. 1, Denver, Colorado,* 313 F. Supp. 279, 282 (D.Colo. 1969), the Court might be inclined to agree. Here, however, in order to avoid an all-black school, the Board would have been forced to transport the children from the Willard and Garfield zones to schools substantial distances away. (T.R. 1 – 1654-1660)

Viewing the circumstances as a whole, we believe that the Board's action was consistent with the policy of assigning children to the closest school.

A preponderance of the evidence does not show that such action was taken with segregative intent.

C. Edison School Fire

On April 24, 1968 Edison School, which was predominantly black, was destroyed by fire. Classes of students and their teachers were sent intact to predominantly white schools. (T.R.1 – 583) The black children were mixed with the rest of the school population when school reopened the following year. (T.R.1 – 611)

Plaintiffs argue that the failure of the defendant to break up these classes of children with five to six weeks of school remaining in the year is evidence of segregative intent. Perhaps such an inference could be drawn if the condition had persisted into the following school year. The action taken was administratively sound for the short period it lasted. Since it was not continued the following year, the preponderance of the evidence does not show segregative intent.

D. Jefferson and Westwood Overcrowding

In the 1969-70 school year, the school administration found it necessary due to overcrowding to transport children assigned to Jefferson and Westwood Schools to other schools, most of which were predominantly white. (Defendant's Exhibit BA; T.R.1 – 1322; 1975) These transfers ended after two years, when the problem of overcrowding was relieved by the middle schools. (T.R.1 – 1323)

Plaintiffs' proffered into the 1972 record the testimony of Dr. Wayne Carle concerning the opposition of white parents whose children attended the receiving schools for the Jefferson transfers. (T.R.1 – 2125-2133) The Court found this testimony irrelevant in 1972, and finds it irrelevant today. What irate citizens

may have said or done cannot be imputed to the Board, unless the Board was swayed by such conduct. No evidence has been presented to suggest that this was the case here.

A preponderance of evidence does not show a segregative intent as to these transfers.

E. Stivers and Roth Transfers

With the expansion of its boundary in 1969 and the assignment of black students to the school, Stivers experienced a number of racial disturbances. At the request of their parents, 34 black students were given temporary transfers to Dunbar or Roosevelt. (T.R.1 – 1259-1266)

A similar problem was encountered at Roth, where 36 white students were transferred to other schools after complaining of threats and harassment from black students. (T.R.1 – 1259)

The Department of Health, Education and Welfare cited these two actions as incidents of resegregation. All too often federal agencies look only to numbers and ignore realities that may exist. (T.R.1 – 1261) These students were transferred on an emergency basis, for one year only, and for the safety of the students involved. The record is devoid of any evidence of segregative intent as to these transfers.

F. Freedom of Enrollment

A review of all the evidence in this case reveals nothing which need be added to this Court's prior findings concerning the freedom of enrollment policy of the Board. Accordingly, those findings are hereby incorporated into this Order. (See Appendix A)

G. Emergency Disciplinary, Medical and Special Education Transfers

This Court has also examined the testimony concerning emergency disciplinary, medical and special education transfers. (T.R.1 – 1524-1525; 1972-1974) A preponderance of the evidence indicates that such transfers were made for legitimate rather than segregatory reasons.

2. Optional Zones

From 1950 to 1972 the Board of Education instituted a number of optional attendances zones, which allowed children living in such zones to select from among two or more schools. The unofficial criteria for setting both attendance zones and optional attendance zones included the availability of space, distance, hazards, accessibility and convenience. (T.R.1 – 1878-1879) The plaintiffs have alleged that optional attendance zones were used as a segregative tool by the board. After reviewing the optional zones which existed in 1972 and the optional zones which were eliminated prior to 1972; the Court makes the following findings:

A. Jackson – Residence Park – Carlson

In 1951 an optional zone was established between Residence Park and Jackson Schools. At that time Residence Park was all-white, and Jackson was 35.9% black. (Plaintiff's Exhibit 100E) Carlson School, built in 1958 was later included in this optional zone. (T.R.1 – 346-347) Included in this optional area was the Veteran's Administration Hospital.

Plaintiffs have alleged that this zone was established to allow white children from the Hospital to attend an all-white school. (T.R.1 – 1452-1454) This allegation is unsupported by evidence. All V.A. students did in fact go to Residence Park, rather than Jackson, but their numbers amounted at most to 40 white students and 8 black students in the course of 15 years. (Defendant's Exhibit CO) By 1963 all three of the schools in this option were over 80% black. (Plaintiff's Exhibit 130C) The Court finds this optional zone to be insignificant in terms of either segregative intent or effect.

B. Roosevelt – Colonel White

In 1951 an optional zone was carved out of the northern boundary of the Roosevelt High School attendance zone, forming roughly a rectangle bounded by Oxford Avenue to the north, Superior Avenue to the south, Salem Avenue to the east, and Rosedale Drive to the west. (T.R.1 – 1459; 1637-1643; 1882-1888) Roosevelt at this time was 31.5% black.

Colonel White housed only ninth and tenth grade students who then completed high school by attending Fairview High School. Both Fairview and Colonel White were 100% white in 1951. (Plaintiff's Exhibit 100E) In approximately 1957 Colonel White became a four-year school. In 1957 the optional zone in question was extended south to Wolf Creek and a short distance west.

No single or predominant reason for the establishment or original configuration of this zone appears from the testimony. Obstacles to access, including Wolf Creek, a set of railroad tracks, a tire company,

and a packing house had confronted students living in the northern portion of this zone since it was established in 1940. Students living north of Wolf Creek who wished to take public transportation to school were required to take a bus downtown and then transfer to a bus which ran along West Third Street to Roosevelt. (French Deposition page 21; T.R.1 — 520-521) By 1951 more direct public transportation was available to Colonel White and Fairview from this area. (T.R.1 — 1885)

In the final analysis the convenience of students and parents became the deciding factor in setting up the zone. (T.R.1 — 1888) As Mr. French stated in his deposition:

> "They said they couldn't see why their youngsters couldn't attend Colonel White because it was closer and that the transportation was better, and this agitation went on for a couple of years. We made a study of it and had a meeting on it and decided that it was a logical and legitimate complaint, and therefore we said the children in this area could have the choice of either going to Roosevelt or to Colonel White."
>
> (French Deposition pages 27-28)

The Court has scoured the entire record in this case in search of some cogent evidence that this optional attendance zone was created for purposes of segregating white students from black students. No such evidence has been found. Not even the effect of the optional zone indicates such a purpose. In 1963 Colonel White was only 1.1% black and Roosevelt had become 94.5% black. Both of these figures reflect the changing racial compositions of the attend-

ance areas which the school serve. (Defendant's Exhibit BY; Plaintiff's Exhibit 130C)

By 1969 Colonel White was 19.3% black and Roosevelt was virtually all-black, again reflecting the composition of their basic attendance zones. By 1972 Colonel White had become 54% black. (Plaintiff's Exhibit 1003) Despite the fact that the black population of Colonel White was increasing during this time, no attempt was made to eliminate or alter the optional zones. As the estimate in Table 3 of Defendant's Exhibit DA indicates, even if the optional zone had been included in Roosevelt's attendance area, Roosevelt would still have been 87% black in 1970.

A preponderance of the evidence has not disclosed any segregative intent or effect in the establishment of the Roosevelt-Colonel White optional zone.

C. Colonel White — Kiser

This optional zone was carved out of the Colonel White attendance zone in 1962. The ostensible reason for creating this zone was to shift more students to Kiser, which had traditionally been under capacity. (T.R.1 — 1898-1899; French Deposition page 30) The Court is unaware of any evidence which would contradict this explanation.

The effect of this optional zone on the racial composition of Colonel White was nil, since only white students lived in the zone and the racial balance at Colonel White was nearly perfect in 1972. (Plaintiff's Exhibit 15B; Defendant's Exhibit DA) Between 1967 and 1971 twenty-seven white students opted to Colonel White and 102 opted to Kiser. In the 1971-72 school

year, no whites opted to Colonel White and 20 opted to Kiser.

A preponderance of evidence does not disclose any segregative intent or effect in the establishment of the Colonel White – Kiser optional zone.

D. Other Optional Zones

The Court has examined the testimony on the following optional zones and has found nothing to indicate that they were established with the intent to segregate. (*See* T.R.1 – 1466-1474; 1602-1615 (Westwood – Gardendale Zone); 1630-1635; 1645-1652; 1905-1917) Those which existed as of 1972 include the following:

EXISTING OPTIONAL ZONES

Optional Zone	Date of Creation	Percentage Black School Population at Date of Creation	Percentage Black School Population As Of 1972-73
Elementary Schools:			
1. Belle Haven/	1955	0.0	17.7
Ft. McKinley		0.0	2.6
2. Residence Park/	1959	a.	100
Jane Adams		29.3 b.	78.7
3. Lincoln/	1957	0.0	0.6
Horace Mann		0.0	3.1
4. Cleveland/	1956	0.0	0.8
Belmont Elem.		0.0	9.4
5. Grant/	1957 c.	0.0	0.3
Belmont		0.0	9.4
6. Eastmont/	1957 c.	0.0	0.7
Lewton		0.0	5.8

Optional Zone	Date of Creation	Percentage Black School Population at Date of Creation	Percentage Black School Population As of 1972-73
High Schools:			
1. Fairview/	1965	0.9 c.	24.1
Roth		53.5 c.	95.8
2. Wilbur Wright/	1956	2.2 b.	9.2
Belmont H.S.		0.0	5.2

* a. Figures not available
b. Figures as of 1951
c. Figures as of 1963-1964

Those which were terminated prior to 1972 include the following:

	Date of Creation	% of Black Students As of 1960 d.	Date Terminated	% of Black Students As of 1971-1972
High Schools:				
Belmont	1956	.09	1969	2.7
Stivers		0.6		12.3
Belmont	1956	.09	1969	2.7
Wilbur Wright		3.5		5.5
Elementary Schools:				
Ft. McKinley	1960	0.0		1.6
Fairport		0.1	f	39.7
Fairport	1960	0.1		39.7
Fairview		1.7	f	7.4

	Date of Creation	% of Black Students As of 1960 d.	Date Terminated	% of Black Students As of 1971-1972
Fairport	1960	0.1		39.7
Cornell Heights		44.2	f	72.3
Jefferson Elem.		60.1		91.3
Cornell Heights	f	44.2	f	72.3
Jefferson Elem.		60.1		91.3
Brown	f	0.6	f	1.0
Jefferson Elem.		60.1		91.3
Edison	f	97.3	f	99.7
Westwood	1957	94.7		99.5
Gardendale		7.9	f	72.3
Cleveland		0.0		0.3
Lincoln		0.0		1.0
Franklin	f	0.0	f	0.0
Orville Wright		0.0		6.7
Kemp	f	0.0	f	7.2
Emerson	1965	0.0	e.	5.6
Irving		100	e.	99.5

* d. Taken from Plaintiff's Exhibit 130D

e. This zone was eliminated three to four years later with the opening of Highway 35. It had virtually no students in it when it was established. (T.R.1 — 1649-1650)

f. Date unavailable from the evidence.

According to the testimony of Mr. Ralph Curk, all of these zones were established for one or more of the five legitimate reasons stated above. (T.R.1 — 1905-1917) No testimony was presented by the plaintiffs which would indicate to the contrary. The objective effects of these zones on the racial composition of the schools which were involved does not disclose any pattern or plan which might have been racially motivated.

The preponderance of evidence has not established any incremental segregative effect or segregative intent as to the now abandoned use of optional zones.

D. The final exception to the Board's attendance zone policy of assignment is the establishment of city-wide high schools which draw their enrollment from the entire district. Two such schools have long been a part of the Dayton system:

1. Paul Lawrence Dunbar High School

Named after a famous black poet who was a native Daytonian, Dunbar opened in 1933 with an all-black staff, a black principal and an all-black student body. (T.R.2 — 411) Throughout its history the school had an open enrollment policy, although in 1942 the 7th and 8th grade classes from Garfield and Willard were assigned to the school. (T.R.1 — 1519) Evidence was also presented which indicates that some black students may have had their elementary school records automatically transferred to Dunbar during the 1930's and 1940's. (T.R.1 — 1388) Although any student in the city could attend Dunbar, for practical purposes only blacks did. (T.R.1 — 1519) Indeed, black students living in the eastern-most portion of the school district traveled across town to attend Dunbar, al-

though they could have attended schools closer to their homes. (T.R.1 – 497-498)

In 1962 Dunbar High School was converted to McFarlane Elementary and a new Dunbar High School was opened. While initially there were some objections by the NAACP to the site of the new school, these objections were withdrawn in 1959. (Defendant's Exhibit N; T.R.2 – 386-388; T.R.2 – 508-512) The new Dunbar had its own attendance boundaries and open enrollment was eliminated.

There is no question that the first Dunbar High School was intended to be and was in fact a black high school. One of the difficulties inherent in the concept of "incremental segregative effect" is the necessity to explore the "alternate universe theory", i.e., what would have happened if Dunbar had not been maintained with a district-wide enrollment. By 1940 the population surrounding Dunbar was 60% to 70% black. By 1950 it was 80% to nearly 100% black. By 1960 almost all of West Dayton was predominantly black. (Defendant's Exhibit BY) While the effects of the Board's segregative acts may have lingered into the 1940's, the ever-increasing black population in West Dayton would have resulted in Dunbar being virtually all black by 1960 even if it had had its own attendance zone. As the West Side Reorganization made apparent, nothing short of transporting students into or out of Dunbar could have integrated the school.

The effects of the Board of Education's segregative acts in 1933 were totally subsumed in the effects of five to six decades of housing segregation in which the Board played no part. We agree with Mr. Robert Rice, a Dayton historian, that "Dunbar High School,

Roosevelt High School, in particular, became all black due to the segregated housing patterns". (T.R.2 – 380)

The Court concludes that the relationship between the Board's past segregative acts and the all-black status of Dunbar High School in 1962 has "become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention." *Keyes, supra* at 211.

The record does not reveal any segregative intent as to the site selection or setting of attendance boundaries for the new Dunbar High School. (T.R.1 – 1812) [8]

The Board of Education followed its customary policy of locating the school where it was needed, at the best available price for the land, and without regard to what the racial composition of the school would be. The fact that housing was built around the school, and that the racial composition of that housing was the same as the rest of the area around it, were events beyond the control of the Board.

The preponderance of evidence does not show any incremental segregative effect from the building and operation of the old Dunbar High School, nor any segregative intent in the building of the new Dunbar High School.

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[8] A review of the testimony including that of Mrs. Miley Williamson, Executive Secretary of the Dayton Chapter of the NAACP, (T.R. 2-384-401), indicates at most an honest difference of opinion upon a subject open to such difference. In addition to acquiescing finally to the site, Mrs. Williamson made no mention of any alternative to the proposed site which was presented to the Board in 1959.

2. Patterson Cooperative High School

In 1954 Patterson Co-op opened as a three-year work-study vocational high school with open enrollment. (T.R.1 – 1739). From 1954 to 1968, the school was under capacity, and as of 1963 had a black enrollment of only 1.8% (Defendant's Exhibit CU) Patterson Co-op's first black teacher was not hired until the early 1960's and its first black counselor was not hired until 1968 or 1969. (T.R.1 – 1748-1749) Students for the school were recruited by teams of counselors who spoke to ninth grade classes in all of the high schools. Beginning in 1965 efforts were made to recruit more black students. (T.R.1 – 1739-1740).

In 1968 Patterson Co-op became a four-year high school, and its selection process was altered. Each elementary school's eighth grade class was alloted 8% to 10% of the total enrollment of Patterson's ninth grade class. (T.R.1 – 1055; 1742) In the 1967-68 school year, Patterson's black enrollment increased to 12.8% (T.R.1 – 1251; Defendant's Exhibit AR) In 1970 objective criteria were incorporated into the selection process. The process was further refined in 1971-72, when the students were selected by a lottery system. (T.R.1 – 1056; 1744).

The preponderance of evidence does not suggest that school officials intentionally discouraged black students from attending Patterson nor that they were systematically excluded from the selection process prior to 1965. Mr. French noted that Patterson Co-op had difficulty in the "early days". But Mr. Nelson Whiteman, Principal of Patterson Co-op, indicated that students were not discouraged from enrolling in the school because of this problem. (French Deposition page 51; T.R.1 – 1763)

The racial imbalance which existed prior to 1965 was totally eliminated by 1972.

III

SITE SELECTION, SCHOOL ADDITIONS, TRANSPORTABLE SCHOOLS, AND SCHOOL UTILIZATION

The plaintiffs have contended throughout this litigation that the Board intentionally located schools where they would become all-black or all-white when they opened or as time passed. As was noted by Dr. Foster, from 1950 to 1972 some 24 new schools were opened by the Dayton Board of Education. Of these 24, 22 opened with 90% or more black or white enrollments; seven schools opened with 90% or more black students; six schools opened with 90% or more white students; and nine schools opened with 90% or more white students, but by 1972 were between 17.7% and 96.7% black. (T.R.1 – 1420-1424)

In addressing this question the Court notes that the process of site selection and enrollment projection was a most imprecise science in the Dayton school system. It approached the level of haphazard in some instances. It was a basic policy to locate schools where the children already lived or were expected to live. Enrollment projections were developed through the use of plat maps obtained from city planners, through information received from public housing authorities, and through guess work as to how an area might develop. (T.R.1 – 1783-1785; Curk Deposition at page 9-13)

After deciding that a new school was needed, school officials attempted to build it within walking distance of a projected development and on the most inexpensive land

they could find. They also worked closely with the city recreation department so that schools could be situated near playgrounds and parks. (T.R.1 – 1785-1786; 1821)

The defendants presented evidence that racial considerations played no part in the site selection for any of the schools built since 1950. That evidence stands virtually undisputed by the plaintiffs. Only the site selections for the following schools have been substantially put into question:[9]

A. Roth High School

When this school opened in 1959 it had a racial mix of 25% black and 75% white. According to Mr. Curk, an effort was made to draw its attendance boundaries in such a way that the school would be integrated. (Curk Deposition at page 52) By 1963 the school remained integrated with a 53.5% black enrollment. (Plaintiff's Exhibit 130C)

Roth High School was apparently built to relieve an expected over capacity in the high schools on the West Side, and to serve the residential area which was expanding at the western limits of the district. The particular site for the school was dictated by land costs. (T.R.1 – 1813-1814)

Dr. Foster correctly noted that the anticipated overcapacity of Roosevelt never materialized. (T.R.1 – 1596) At the time, however, the school district was in a period of growth and an area close to Roth was marked for annexation by the City of Dayton. (Defendant's Exhibit B; T.R.1 – 1790-1791) Although this area was not annexed, the Court cannot say that the Board's expectations were so unreasonable as to bring the defendants' explanation for the

[9] The question of the site selection for the new Dunbar High School has already been treated, *supra*.

school site into question. Whatever effect Roth High School may have had in taking white students out of Roosevelt became academic by 1969, since by that time both schools had become entirely black.

While Dr. Foster never intimated that Roth High School was intended to be an all-black high school, he employed his most acute hindsight in suggesting that one large school built halfway between where Roth and Meadowdale are presently located might have avoided the problem. (T.R.1 – 1601; 1697) Ironically, had that suggestion been followed the school might very well have been built in the vicinity of what is now a predominantly black residential area. *See* Defendant's Exhibit BY.[10]

The preponderance of evidence shows neither segregative intent, nor incremental segregative effect, nor any reasonable alternative to the site of Roth High School.

B. Gardendale, Highview and Miami Chapel

It is undisputed that there were three legitimate reasons for building Gardendale: First, it was intended to house the district's program for mentally retarded students; Second, it was built to relieve overcrowding at Westwood; and Third, it was built in anticipation of the annexation of the Townview area. (T.R.1 – 1608-1609; 1790-1791; Curk Deposition at page 91)

Plaintiffs' sole argument as to this school was that it opened with a low black enrollment. The Court finds no

[10] The location of Roth High School typifies the classic dilemma faced by a Board of Education. If a school is located within the area it is intended to serve, the Board will be accused of creating "a black school." If it is located adjacent thereto and the area becomes black, the Board will be accused of creating a "holding pattern" to contain blacks.

See Foster Testimony (T.R. 1 1600-1601)

significance to this fact, particularly since Gardendale was 72.3% black in 1971-72. (Defendant's Exhibit CU)

Plaintiffs have urged the same argument as to Highview which was 1.7% black when it opened in 1951. Dr. Foster contended that had Highview's boundaries been moved north, it would have opened as an integrated school and would have stabilized the area. (T.R.1 – 1615-1620) As was previously noted, Highview was included in the West Side Reorganization. Part of the reason it became virtually all-black a few years later was because of an attempt to integrate and "stabilize" the schools in that area.

As for Miami Chapel, while Mr. John W. Harewood, former Assistant Superintendent in Charge of Administration, objected to its construction in its present location, he conceded that it was built there to relieve overcrowding in other existing schools and to accommodate the needs of students living in the area. (T.R.2 – 545-547)

A preponderance of the evidence does not establish segregative intent in the site selections of these three schools.

C. The Primary-Elementary Campuses

As a matter of Board policy, all of the primary schools in the district are placed next to elementary schools primarily because the site is already there and is convenient to the students. (T.R.1 – 1793)

Dr. Foster indicated that in his experience this campus set-up has been used as a segregative device. While this may have been true in other districts which Dr. Foster has examined, no evidence has been presented which indicates that that was the case in Dayton. Jackson Primary was built because of the expansion of a housing project near the school. (T.R.1 – 1832) The site for the Jefferson Primary was hotly disputed. Some school officials wanted it located on ten acres of land with recreational facilities in

the southwest portion of the attendance area. This site was rejected for integrative reasons. (T.R.1 – 1795-1797) Mr. Harewood urged that it be located on a site near Princeton Park to the north of the present site. (T.R.2 – 506) The Jefferson Primary was finally placed next to the elementary.

The preponderance of evidence does not establish a segregative intent in utilizing primary-elementary campuses.

C. Additions and Portables

From 1950 to 1972 ninety-five school additions were constructed. Of those ninety-five, seventy-eight were made to schools which had a student population of 90% or more black or white. (T.R.1 – 1548) As with new schools, classrooms were added as they were needed and were used to accommodate growth in lieu of changing attendance zones. (T.R.1 – 1814) Portables were also used on a limited basis where schools were overcrowded. In 1972 eleven portables were located at four schools, two of which were predominantly white and two of which were predominantly black. (T.R.1 – 1444-1445) The fifteen other portables used between 1966 and 1972 were similarly distributed. (T.R.1 – 1447)

While Dr. Foster noted that additions and portables are sometimes used as segregative devices, he offered no specific instances of such a use with an intent to segregate in the Dayton system.

D. School Utilization

Plaintiffs have cited a number of schools which were under-capacity by 1972, particularly schools in the northern part of the district, such as Hickorydale, Horace Mann, Meadowdale, Shoup Mill, Valerie, and Meadowdale High School. (T.R.1 – 1828-1847)

As has already been noted, site selection in the Dayton school system was done on a very unsophisticated basis and some errors in judgment were inevitable. One example is Shoup Mill School, located at the northernmost part of the district. According to Mr. Curk, that school was built on the expectation that the open land immediately to the south would be developed. It was developed, but into apartments and not houses. The expected number of students for the school never really materialized. (Curk Deposition at page 25) It should also be noted that all but one of the schools listed above opened prior to 1964, the peak year of the school system's enrollment. Between 1964-65 and 1972-73, the total enrollment in the system dropped from 60,633 to 50,802 and the percentage of black enrollment increased from 31.1% to 44.6%. (Plaintiffs' Exhibits 1002; 1003)

Plaintiffs contend that the school system should have transported students from such overcrowded schools as McFarland and Jefferson to schools in the northern part of the district which were operated at less than capacity. Citing the Touche-Ross study of the school system made in 1972, plaintiffs also contend that older schools should have been closed and students reassigned to promote integration. (T.R.1 – 1440-1443)

While it may have made economic sense for the Dayton school system to close schools, the wisdom of the decision not to do so is not before the Court. Our inquiry is directed to the question of whether the school board was purposefully maintaining older schools in order that they would remain all-black or was purposefully maintaining schools at under-capacity in order that they would remain all-white. No evidence has been presented to indicate that such was the case. Again the plaintiffs have failed to sustain their burden of proof under the Supreme Court's Order of Remand.

The preponderance of the evidence does not establish segregative intent in the utilization of schools.

E. The basic assertion throughout this portion of plaintiffs' case appears to be that the defendants had a duty to put schools not where the children were, but where the children should be, and that by not putting schools where children should be, the defendants have engaged in intentionally segregative acts. This was the heart of Dr. Foster's and Mr. Harewood's testimony on this question. (T.R.1 – 1425; T.R.2 – 498-500)

Dr. Carle suggested that the school system had the power and duty to deny schools to a developer whose housing subdivision was not integrated. (T.R.2 – 112) Presumably, under this argument the Board of Education also should not provide schools for public housing projects which were not integrated. Plaintiffs argued strenuously that the rental of space for kindergartens or primary grades in *de jure* segregated housing projects during the 1940's made the school system a partner in the public housing authority's wrongful acts. (T.R.1 – 150-170; 209) They have intimated that schools such as Miami Chapel and Jackson Primary should not have been built in close proximity to the housing projects they served, but rather should have been built somewhere else.

There is language in *Swann* v. *Board of Education of Charlotte-Mecklenburg,* 402 U.S. 1, 20-21 (1972) which notes the correlation between school locations and segregated housing patterns. It must, however, be considered in light of the remand in this case, which requires a showing of segregative intent as a prerequisite to imposing a remedy. Nothing in *Swann* relieves the plaintiffs of the burden of proving that school officials intended their site selections to have a segregative effect on the school population and

housing patterns, and that the site selections did in fact have such a segregative effect.

Neither in 1972 nor in 1977 have plaintiffs shown that school authorities conspired with public or private developers to make the West Side all black, that they intentionally established black schools to further this goal, that they established all-white schools on the school district periphery to impact black children into the West Side, or that they closed schools which were becoming integrated. Plaintiffs instead have relied entirely upon the *theoretical* effect of the defendant's policies to show segregative intent. The Court emphasizes "theoretical" because there is an absence of evidence showing the actual effects of the defendant's site selection process on housing patterns.

This is a critical distinction that must be recognized. Plaintiffs now bear a burden of demonstrating "any action . . . which was intended to and *did in fact* discriminate . . ." *Dayton Board of Education* v. *Brinkman, supra*, Slip Opinion at page 13, emphasis added.

The preponderance of evidence does not establish that defendants' policy of site selection, construction of additions, use of portables, or school utilization had a segregative purpose or that such policy had an incremental segregative effect upon minority pupils, teachers, or staff.

ACTIONS OF THE BOARD OF EDUCATION 1967 - 1972

In dealing with the question of Board action in December, 1971 and January, 1972, the Supreme Court made the following observation:

> The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman*

> v. *Mulkey*, 387 U.S. 369 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. We agree with the Court of Appeals' treatment of this action, wherein that court said:
>
> > 'The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is *inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took*. Cf. *Hunter* v. *Erickson*, 393 U.S. 385 (1960); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). *If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation*. If the Board was under such a duty, then the recission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the recission *ipso facto* is an independent violation of the Constitution. 503 F.2d 684, 697.
>
> *Dayton Board of Education* v. *Brinkman*, Slip Opinion at page 7 (emphasis added)

In order to evaluate the significance of the actions of the Board of Education, the Court deems it necessary to trace the history leading up to those actions in somewhat greater detail than was done in the Order of February 7, 1973.

During the late 1960's the Board of Education was under almost constant pressure from community groups to relieve the racial imbalance existing in the schools. (T.R.1 — 936-987) In 1967 the Board resolved that it would seek to end racial imbalance in the schools, and established the Citizens Advisory Council to investigate the problem. As a reaffirmation of intent, Dr. Carle issued a statement to the Board of Education in August of 1968 noting the

earlier efforts of the Board to integrate and setting forth positive goals for the future. With the HEW Compliance Report (Plaintiff's Exhibit 11A) and the report of the Citizens Advisory Council, (T.R.1 – 2018), the pressure on the Board intensified.

In November of 1969 four new members were elected to the Board. At least two of these new members ran on the ticket of Serving Our Schools Committee which was pledged to neighborhood schools and against transportation of students to achieve racial imbalance (sic). The rest of that year was marked by constant strife among the members of the Board as to what steps should be taken. (T.R.1 – 1044-1047)

At the same time, the school system was in financial trouble and numerous attempts to pass operating levies failed. On October 26, 1970 all of the members of the Board signed the following resolution: "There will be no forced busing during the term of the administration of the current school board unless it is so ordered by lawful authority". (Joint Exhibit II) As two witnesses who were on the board at that time explained, the purpose of this resolution was solely to pass a school levy. The effort failed and the November, 1970 levy was defeated. (T.R.1 – 2032; T.R.2 – 449-452)

In January of 1971 another resolution was issued which stated that there was no alternative to the neighborhood school concept. (Defendant's Exhibit BU) Again, the purpose of this resolution was to generate support both for a bond issue and for a levy to be presented in the November, 1971 election. (T.R.2 – 454-456)

Caught between the political equivalent of Scylla and Charybdis the Board continued to wrestle with the issue of racial imbalance. In December of 1970 the Board held a public hearing on this question. (T.R.1 – 2066) In

January and March of 1971 the Board called upon the state Department of Education for assistance. (T.R.1 – 2069) On April 29, 1971 the Board established a citizens committee known as the Committee of 75. (Plaintiffs' Exhibit 9)

Predictably, desegregation was a hotly contested issue in the school board election of November, 1971. One incumbent and two new members were elected to the three available seats. The election gave the neighborhood school forces a majority on the Board. (T.R.1 – 1130-1134; T.R.2 – 245)

Those election returns set in motion the following sequence of events. On December 2, 1971 the Committee of 75 made its report to the Board. Mr. Leo Lucas, President of the Board at that time, asked Dr. Carle and his staff to prepare resolutions which would implement the recommendations of the Committee of 75. (T.R.1 – 1135; 1142) On the following Monday morning, December 6, 1971, Dr. Carle and his staff met to consider a draft of the resolutions prepared by Dr. Carle. Mr. Louis Lucas, plaintiff's attorney in this case, also participated in this meeting at the request of Mr. Leo Lucas. (T.R.1 – 1151-1152) Dr. Carle apparently had also consulted Dr. Foster prior to this time, (T.R.1 – 1155) and later that evening a "social affair" was held at Mr. Leo Lucas' house at which Mr. Louis Lucas, Mr. Richard Austin, Mrs. Jane Lois Sterzer, Mrs. Miley Williamson, and other members of the NAACP were present. The only board members present were Mr. Lucas and Mrs. Sterzer. (T.R.1 – 1158-1159) Dr. Carle's testimony indicates that he had had other conversations with Mr. Louis Lucas concerning "the status of desegregation litigation around the country", and wished to have him review the resolutions so that they would be "legally in harmony with the status of desegrega-

tion as it existed in the country at that time". (T.R.1 – 1159-1160) The legal effect of the resolutions possibly being rescinded at a later time apparently was also discussed. (T.R.1 – 1160)

The three resolutions were submitted to the Board on December 8, 1971. (T.R.2 – 246-248; Plaintiff's Exhibits 7A, 7B, 7C) With the exception of Mr. Leo Lucas and Mrs. Jane Sterzer, no member was consulted about the resolutions prior to their submission to the Board. They were approved at the December 8th meeting and a motion for reconsideration was immediately raised. (T.R.1 – 1174) The Court notes that this is the same Board which two years before pledged "no forced busing" during its term, and less than one year before had seen no alternative to neighborhood schools. (T.R.1 – 1120-1121; 1124-1125)

Almost immediately after the resolutions were passed, Dr. Carle contacted Dr. Gordon Foster to develop a plan for implementation of the resolutions. Dr. Foster came to Dayton on December 10th and a plan was prepared by the end of December. (T.R.1 – 1169) In the meantime the Board met on December 16th and December 30th in an attempt to resolve the motion for reconsideration of the resolutions. (T.R.1 – 1165)

On January 3, 1972, hours before the first meeting of the newly-constituted Board, Dr. Carle met with the news media and announced that Dr. Foster's plan, which would involve the potential transportation of in excess of 22,000 students, had been adopted and would be implemented. (T.R.1 – 1177; 1175) Later that day the Board rescinded the resolutions of December 8th.

The Court does not believe that violations of the United States Constitution can be manufactured by political or legal maneuvering. Surely the gravity of school desegregation cannot turn on such intrigue. The Court finds that while the Board of Education accepted a moral obligation to attempt to relieve racial imbalance in the schools, it was not under a constitutional duty to reorganize the entire structure of the school system so that "no building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole". (Plaintiff's Exhibit 7C) Since the Court finds that the Board was not under a constitutional duty to take its initial action, "the rescission of the initial action in and of itself cannot be a constitutional violation." *Dayton Board of Education* v. *Brinkman,* Slip Opinion at page 6, *quoting Brinkman* v. *Gilligan,* 503 F.2d 684, 697 (6th Cir. 1974).

V

EVENTS OCCURRING AFTER 1976

In the most recent hearing on this case plaintiff cited three additional indicia of alleged segregative intent on the part of the Board of Education.

The first involves a suspension and expulsion of students occurring since this Court's Order of March 23, 1976. Plaintiffs have presented evidence which indicates that for the school year 1976-77, 1,910 white students were suspended or expelled while 3,499 black students were suspended or expelled. (T.R.2 – 339) No evidence was presented to indicate that black students were being discriminated against in the enforcement of school rules or that disproportionate numbers of black students were being suspended or expelled from formerly all-white schools.

Second, plaintiffs assert that there are insufficient numbers of blacks in the central office of the school administration. The testimony of Mr. Jerry Steck indicates to the contrary, since the proportion of blacks, exclusive of cleri-

cal people, has gone from 23.7% in 1973 to 40% in 1976. (T.R.2 – 563)

Finally, plaintiffs have raised a question concerning the administration of the pairing plan for high schools. That there has been a misunderstanding regarding this Court's Order of March 23, 1976 is clear; what is not clear nor proved is that such Order was deliberately misunderstood. There is no evidence to indicate that the racial distribution in the high schools violates this Court's Order. Accordingly, plaintiffs have not sustained their burden of proof as to these three allegations.

VI

CONCLUSION

A. The Order of February 7, 1973 Revisited

In the review of this case the Court has re-examined with care its previous findings and the evidence supporting them.

The events of the ensuing five years and the evidence presented in November of 1977 have not materially altered the validity of those findings: There are many racially imbalanced schools in the Dayton school system; acts of intentional segregation by the Dayton Board of Education ended over twenty years ago; the Dayton Board of Education created optional attendance zones that had a potential segregative effect; the Dayton Board of Education rescinded resolutions that would have corrected racial imbalance.

To the foregoing plaintiffs have added little. Evidence of segregative intent and incremental segregative effect has not been supplied. Accordingly, the Court must find that plaintiffs have failed to meet their burden of proof as now imposed by the Supreme Court of the United States.

That this conclusion differs from the one reached in 1973 is less a function of change in view and more a function of change in standard.

B. Recommendation:

Although this Court must now decline to impose a legal duty upon the Board of Education in the absence of a constitutional violation, it does likewise decline to relieve the Board of Education of its moral obligation accepted in 1967 to reduce the racial imbalance in the Dayton schools. The means of accomplishing this are at hand. The Board may continue with paired schools, it may provide for transportation of students, or it may institute its already existing plan for magnet schools.

There is now a clear choice available to both sides: This decision can be either a beginning or an ending. If a decade of community controversy and five years of expensive, time-consuming, and devisive litigation are not enough, further excursions through the federal court system are available. Litigation, however prolonged, is not an end in itself. It is intended to settle disputes not perpetuate them. This Court's opinion in February, 1973 ended with these words: "We commend to the School Board of the City of Dayton its moral obligation to provide the highest possible level of education for all children entrusted to its care without distinction or bias or partiality.".

If this Court can do no more than to remind the parties of their obligation, it should do no less than to urge an alternate disposition of this dispute.

CONCLUSIONS OF LAW

A. This Court has jurisdiction over this matter under 28 U.S.C. § 1343.

B. Acts of intentional segregation which ended in excess of twenty years ago are not constitutional violations in the absence of a showing of an incremental segregative effect thereof.

C. A policy of establishing and maintaining neighborhood schools is not in and of itself a constitutional violation.

D. Unless a Board of Education is under a constitutional duty to take certain action, a rescission of such action is not in and of itself a violation of plaintiffs constitutional rights.

E. Racial imbalance in a school system is not in and of itself a constitutional violation.

F. There is a burden upon plaintiffs to establish by a preponderance of evidence both a segregative intent and an incremental segregative effect in order to establish a violation of the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs have failed to meet this burden of proof as to each allegation discussed in this Order. In view of the foregoing, the complaint herein is hereby DISMISSED. Each side shall bear its own costs.

LET JUDGEMENT ISSUE IN ACCORDANCE WITH THE FOREGOING.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

P. OPINION OF COURT OF APPEALS DATED JULY 27, 1978

(Filed July 27, 1978)

No. 78-3060

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BRINKMAN, et al., *Plaintiffs-Appellants,* v. JOHN J. GILLIGAN, et al., *Defendants-Appellees.*	APPEAL from the United States District Court for the Southern District of Ohio.

Before: PHILLIPS, Chief Judge, LIVELY, Circuit Judge, and PECK, Senior Circuit Judge.

PHILLIPS, Chief Judge.

For the fourth time this court is called upon to review the protracted proceedings of this action brought by plaintiffs[1] to obtain relief from alleged unconstitutional segregation of the Dayton public schools resulting from actions by defendants.[2] Reference is made to the previous decisions of this

[1] Parents of children attending schools operated by the defendant Board of Education (hereinafter Board) filed this action on April 17, 1972 alleging that defendants were responsible for operating a racially segregated school system in violation of the fourteenth amendment and Federal civil rights statutes, 42 U.S.C. §§ 1981, 1983-88, 2000d.

[2] Defendants included the Dayton Board of Education, its superintendent and individual members, and the governor, attorney general, State Board of Education, and superintendent of public instruction of the State of Ohio. Appellants have not sought any relief against the State defendants on the present appeal. "Defendants," as used in this opinion, refers to the local defendants.

court for a detailed recitation of facts and issues. *See Brinkman* v. *Gilligan*, 539 F.2d 1084 (6th Cir. 1976) (*Brinkman* III), *vacated and remanded sub nom., Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977); *Brinkman* v. *Gilligan*, 518 F.2d 853 (6th Cir. 1975) (*Brinkman II*); *Brinkman* v. *Gilligan*, 503 F.2d 684 (6th Cir. 1974) (*Brinkman I*).

In its initial opinion filed February 7, 1973, the district court found that racially imbalanced schools, optional attendance zones, and the rescission by the Dayton Board of Education (hereinafter Board) of three resolutions calling for racial and economic balance in each public school were "cumulatively in violation of the Equal Protection Clause" of the Constitution. In *Brinkman I, supra*, 503 F.2d 684, this court affirmed the holding of the district court that the Dayton public schools were unlawfully segregated by race and also reviewed four school practices[3] which allegedly maintained and expanded the segregated school system. This court determined that at that time it was unnecessary to consider whether these four practices should be included as part of the constitutional violation in view of the conclusion that the remedy ordered by the district court was inadequate "considering the scope of the cumulative violations." *Id.* at 704.

Following remand, this court again rejected the desegregation plan adopted by the district court on the grounds that the plan failed to eliminate the "basic pattern of one-race schools" and the "continuing effects of past segregation" throughout the Dayton school system. *Brinkman II, supra*, 518 F.2d at 857. We again remanded the case to the district court with the following instructions:

> On remand we direct that the court adopt a systemwide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976. *Id.* at 857.

[3] These practices are in the areas of faculty and staff assignment; school closing and site selection; grade structure and reorganization; and pupil transfers and transportation. The district court did not include any of these practices within its finding of a cumulative constitutional violation.

After evidentiary hearings and the appointment of a master, the district court ordered the implementation of a systemwide desegregation plan for the 1976-77 school year subject to flexible guidelines.[4]

In *Brinkman III, supra*, 539 F.2d 1084, this court approved the systemwide plan which thus became operative for the 1976-77 school year. Subsequently, the Supreme Court vacated the judgment[5] of this court and ordered that the case be remanded to the district court for further proceedings. *Dayton Board of Education* v. *Brinkman, supra*, 433 U.S. 406 (1977). The Supreme Court directed that the district court:

[4] The plan required that the racial distribution of each school be brought within 15 percent of the black-white population ratio of Dayton which was 48 percent black and 52 percent white. In its order of December 29, 1975 the district court stated:

> In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary students.
>
> 1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
>
> 2. Students should be transported to the nearest available school.
>
> 3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

JA-I at 55. [Citations to the record are to the joint appendix (JA) and the volume of the appendix (*e.g.*, -I) unless otherwise noted].

[5] The Supreme Court, however, directed that the plan approved by this court in *Brinkman III* should remain in effect for the 1977-78 school year "subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion."

> first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff.
>
> • • •
>
> If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. (citations omitted). 433 U.S. at 420.

On remand, the district court conducted evidentiary hearings November 1-4, 1977, and in its decision issued December 15, 1977, held that:

> [T]here is a burden upon plaintiffs to establish by a preponderance of evidence *both* a *segregative intent and an incremental segregative effect in order to establish a violation* of the Equal Protection Clause of the Fourteenth Amendment. (emphasis added) JA-I at 104.

Pursuant to this misunderstanding[6] of the Supreme Court's mandate, the district court individually examined each alleged constitutional violation both for segregative intent and incremental segregative effect. The district court concluded that plaintiffs had failed to meet this burden of proving a constitutional violation and dismissed the complaint. Following the filing of this appeal, this court on January 16, 1978 ordered defendants "to cause said system-wide desegregation plan to remain in effect pending appeal, or until further order of this court."

[6] *See* note 36, *infra*, and accompanying text.

Appellants and the United States as amicus curiae (hereinafter collectively referred to as appellants) contend that various findings of fact and conclusions of law of the district court are both clearly erroneous and are based upon incorrect legal standards. They urge this court to address the legal and factual issues previously reserved in *Brinkman I*, *supra*, 503 F. 2d 684 and to find that the alleged constitutional violations have a systemwide impact which requires reinstatement of the systemwide remedy approved by this court in *Brinkman III*, *supra*, 539 F.2d 1084. Appellants raise four principal assignment of error. First, they contend that the district court misinterpreted the legal relevance of the Board's conduct prior to the time of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and that the district court's finding that "[a]t no time . . . did defendant maintain a dual system of education"[7] was either based upon the application of incorrect legal standards or was a clearly erroneous factual finding. Appellants argue that as a result of these errors, the district court ignored the principle that if the Board was operating a dual school system at the time of *Brown I*, or at any time thereafter, it subsequently had an affirmative duty to eliminate the systemwide effects of its prior acts of segregation. Second, appellants argue that the district court erred in applying improper legal standards for determining segregative intent. They assert that the district court both failed to utilize the established burden-shifting principles in determining whether various practices were the product of segregative intent and disregarded the established legal standards for determining segregative intent. Third, appellants contend that the district court erred in failing to apply the presumption and burden-shifting principles concerning causation and the impact of unconstitutional conduct. Finally, appellants assert that the district court misallocated the burden of proof on the issue of the incremental segregative effect of the alleged constitu-

[7] Order of March 10, 1975, JA-I at 38.

tional violations. They argue that the district court erred in holding that plaintiffs were required to demonstrate both the existence of racial discrimination and the specific effects of that discrimination.

Upon a review of the entire record, the arguments of counsel, and upon consideration of the legal and factual issues previously reserved by this court in *Brinkman I, supra,* 503 F.2d 684, we conclude that the systemwide desegregation plan approved by this court in *Brinkman III, supra,* 539 F.2d 1084, should be reinstated. The record demonstrates conclusively that at the time of *Brown I,* defendants intentionally operated a dual school system and that subsequently, defendants never fulfilled their affirmative duty to eliminate the systemwide effects of their prior acts of segregation. To the extent that any findings of fact and conclusions of law of the district court are to the contrary, they are either clearly erroneous, Rule 52 FED. R. CIV. P., or are incorrect as a matter of law.

I. Pre-Brown violations

This court previously reviewed defendants' purported intentional segregative acts alleged to have occurred prior to 1954 and concluded that "the Dayton school system has been and is guilty of de jure segregation practices"[8] which constituted a "basically dual system,"[9] at the time of *Brown I.* Although we believe this finding to have been implicit in the previous decisions of this court, we now expressly hold that at the time of *Brown I,* defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment. Our holding is based upon substantial evidence, much of which is undisputed. The finding of the district court to the contrary[10] is clearly erroneous,

[8] *Brinkman II, supra,* 518 F.2d at 854.

[9] *Brinkman I, supra,* 503 F.2d at 697.

[10] *See* note 7, *supra* and accompanying text.

Rule 52, FED. R. CIV. P., and is based upon both a failure to attribute the proper legal significance to the evidence of pre-*Brown I* violations and upon various errors of law.

Our review of the record reveals that as of the 1951-52 school year – the last period prior to *Brown I* for which racial statistics were compiled – the Dayton school board pursued an overt policy of faculty segregation and, through a variety of measures, endeavored to segregate pupils on a racial basis. Defendants admitted that prior to 1951 the board forbade the assignment of black teachers to white or mixed classrooms "pursuant to an explicit segregation policy."[11] The district

[11] *Brinkman I, supra,* 503 F.2d at 697. Defendants admitted that:

> 9. Not until 1951 did the Board of Education adopt a policy of assigning any black citizen to teach in white or mixed classrooms.

See Answers to Plaintiffs' Request for Admissions filed by defendants Dayton Board of Education, Josephine Groff, James D. Hart and William E. Goodwin (hereinafter Board admissions), admission 9, JA-I at 128; Answers to Plaintiffs' Requests for Admissions filed by defendants Dr. Wayne M. Carle, Superintendent of Schools, and Jane Sterzer (hereinafter Carle admissions), admission 9, JA-I at 135. *See generally* Plaintiffs' Exhibits (hereinafter PX) 100 A-E, JA-V at 502-06; PX 29, JA-V at 484-85.

In 1951-52, the Board substituted the following new but equally unacceptable policy:

> The school administration will make every effort to introduce some white teachers in schools in negro areas that are now staffed by negroes, but it will not attempt to force white teachers, against their will, into these positions.
>
> The administration will continue to introduce negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers.
>
> PX 21, JA-V at 481.

Cf. Cooper v. *Aaron,* 358 U.S. 1 (1958) (community attitudes no justification for segregation).

Superintendent Carle admitted that:

> 11. About 1951 the Board announced a policy, again for the first time, of introducing white teachers in schools having Negro population; on November 30, 1954, only 8 full or part-time white teachers, or 0.6% of the 1409 white teachers were in these situations. Defendant French at that time as Superintendent attributed such lack of success to the reluctance of white teachers to teach in the black schools; moreover, it was then the District's policy and so remained until the late 1960s, not to assign or reassign white teachers to black schools against their will. Even into the late 1960's white teachers often were

court found that "until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative."[12] A review of the record establishes to our satisfaction that the assignment of faculty was purposefully segregative;[13] but contrary to the finding of the district court, we found in *Brinkman I, supra*, 503 F.2d at 697-98 that the Board "effectively continued in practice the racial assignment of faculty through the 1970-71 school year." To the extent that the finding of the district court is contrary to the conclusion of this court, it is clearly erroneous.

The undisputed evidence reflects that during the 1951-52 school year, the faculty at the four 100 percent black schools (Garfield, Dunbar, Willard, and Wogamon) was 100 percent black whereas with one exception,[14] the faculty at all other schools in the system was 100 percent white.[15] Defendants further admitted that as of 1954, 91.4 percent of the 162 non-travelling black teachers were assigned to schools with all black student populations.[16] Thus, at the time of *Brown I*, it was possible to identify a "black school" in the Dayton system without reference to the racial composition of pupils.

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not hired or refused employment or were assigned to predominately white schools in the District because of the availability of teacher openings in the suburban, all white schools, the personal beliefs and behavior of white applicants, and the policies and practices of the District.

Carle admission 11, JA-I at 135. The Board also admitted the above statement in substantial part. *See* Board admission 11, JA-I at 128-29.

[12] Opinion of December 15, 1977, JA-I at 73.

[13] *See, e.g.*, testimony of Dr. Wayne Carle, quoted in *Brinkman I, supra*, 503 F.2d at 699.

[14] The sole exception apparent from the record was one black teacher who was assigned during the 1951-52 school year to teach black students at a school with a 67.6 percent black enrollment — the highest black enrollment less than 100 percent. *See* PX 3, JA-I at 139; PX 100E, JA-V at 506; PX 130B, JA-V at 507.

[15] *See* PX 100E, JA-V at 506; PX 130B, JA-V at 507.

[16] *See* Board admission 10, JA-I at 128; Carle admission 10, JA-I at 135.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971), the Supreme Court stated:

> Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.[17]

The district court, however, failed to attribute the proper legal significance to the deliberate policy of faculty segregation adopted and applied by defendants.

The purposeful segregation of faculty by race was inextricably tied to racially motivated student assignment practices. The record reflects that in the 1951-52 school year, 77.6 percent of all students attended schools in which one race accounted for 90 percent or more of the students and 54.3 percent of the black students were assigned to the four schools that were 100 percent black.[18] We recognize that racial imbalance in student attendance patterns is not in itself a constitutional violation. *See Dayton Board of Education* v. *Brinkman, supra*, 433 U.S. at 413, 417 (1977); *Washington* v. *Davis*, 426 U.S. 229, 240 (1976); *Keyes* v. *School District No. 1*, 413 U.S. 189, 198 (1973). However, such racial imbalance does assume increased significance in the historical context of repeated intentional segregative acts by the school board directed at the four schools which were 100 percent black in 1954. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977). Defendants contend that such evidence of pre-*Brown I* constitutional violations is irrelevant, or, alternatively,

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[17] *See United States* v. *Board of School Commissioners of Indianapolis, Indiana*, 474 F.2d 81, 87 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

[18] *See* PX 2B, JA-V at 312; *Brinkman I, supra*, 503 F.2d at 694.

that the effects of any past intentional segregative actions have become attenuated in the ensuing years. These contentions are wholly without merit. First, with respect to evidence of pre-*Brown I* constitutional violations, the Supreme Court noted in *Keyes, supra*, 413 U.S. at 210-11 that:

> We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'

Second, with respect to the question of attenuation, defendants have failed to meet their burden of proving that the effects of any past intentional actions have become attenuated. *Keyes, supra*, 413 U.S. at 211.

Garfield school was the site of intra-school racial segregation which began in 1912 and was ruled illegal by the Supreme Court of Ohio in *Board of Education of School District of City of Dayton* v. *State ex rel. Reese*, 114 Ohio St. 188, 151 N.E. 39 (1926).[19] Defendant Wayne Carle, Superintendent of the Dayton schools, admitted, however, that racial segregation continued virtually unabated at Garfield after the *Reese* decision,[20] and that during the 1930s, white students who lived in the Garfield attendance area were permitted to transfer to predominantly white schools.[21] As a result of the

[19] Defendants admitted that:

> 1. In 1918 defendant Dayton Board assigned 4 black teachers to a frame two-story house which was converted to a school building for black students and which was located immediately behind the Garfield school, a brick building. All white children and all white teachers were assigned to the brick building; only black teachers and black students were assigned to the frame structure.

See Board admission 1, JA-I at 125; Carle admission 1, JA-I at 134.

[20] *See* Carle admission 2(b), (c), JA-I at 134.

[21] *See* Carle admission 2(d), JA-I at 134.

actions of the Board, Garfield became all black in student enrollment in 1936 and, at approximately the same time, an all black faculty was assigned to the school.[22] Thereafter, Garfield was maintained as an all black school.

The district court found that Dunbar high school intentionally had been established as a district-wide school for only black students with an all black faculty and a black principal.[23] The record reveals that black students throughout Dayton automatically were assigned or otherwise were induced to attend Dunbar and that, in many instances, black students crossed attendance boundaries to do so.[24] Defendants further admitted that until approximately 1947, Dunbar was not allowed to participate in the city athletic conference and consequently, Dunbar athletic teams played other all black high schools from other cities.[25] Defendants also admitted that until several months after the decision in *Brown I*, black children were transported by bus from an orphanage past white schools to Dunbar.[26] The district court found that this practice was "arguably . . . a purposeful segregative act."[27] To the extent that this finding implies that this practice was *not* purposefully segregative, it is clearly erroneous.

[22] *See* PX 150I, JA-V at 524; JA-II 260-61, 329-31.

[23] Opinion of February 7, 1973, JA-I at 3; Opinion of December 15, 1977, JA-I at 88. *See* Board admission 7(a), JA-I at 127; Carle admission 7(a), JA-I at 135.

[24] *See* JA-II, 268, 478-79; JA-III, 547-49, 632-33.

[25] *See* Board admission 7(f), JA-I at 128; Carle admission 7(f), JA-I at 135.

[26] *See* Carle admission 7(d), JA-I at 125; Board admissions 7(d) 31A, JA-I at 127, 131. The Board has adopted conflicting positions with respect to the termination of this practice. In admission 7(d), *supra*, the Board states that "this policy terminated as of 1950." In admission 31A, however, the Board states that "this practice stopped in 1954." Other evidence in the record establishes without question that this practice was not discontinued until September 1954. *See* PX 28, JA-V at 483.

[27] Opinion of December 15, 1977, JA-I at 78.

Defendants assert that since attendance at Dunbar was voluntary, there is no justification for finding that the establishment and operation of the school constituted intentionally segregative acts. This argument misses the point entirely. First, until at least as late as 1952, the option of attending Dunbar was available only to blacks since, pursuant to school board policy, whites could not be taught by Dunbar's all black faculty. Second, the record reflects that many black children were automatically assigned or otherwise encouraged to attend Dunbar regardless of choice.[28] Finally, the record indicates that the "choice" of attending Dunbar, in many instances, may have been merely a less drastic alternative than attending other schools which practiced intra-school segregation and discrimination.[29]

In this manner and through these procedures, the Board intentionally operated Dunbar as an all black school until it was closed as a high school in 1962. The operation of Dunbar clearly had the effect of keeping other high schools throughout the district predominantly white during those years.[30]

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[28] *See* JA-II at 479; JA-III at 547-49.

[29] *See* JA-II at 253, 284; testimony of Dr. Wayne Carle, Joint Appendix vol. 4, at 1518a-19a filed in *Brinkman I, supra.* The relevant colloquy between counsel and Dr. Carle is as follows:

> Q. Dr. Carle, I think you perhaps misunderstood my question. I am talking about Dunbar in its earliest stage. There was testimony from black witnesses that they 'chose Dunbar,' and I asked you in the context of the pupil assignment practices whether or not such a choice is a free choice as if in the case of Roosevelt students were subject to discriminatory practices [sic].
>
> A. I wouldn't rate it as a free choice since social pressures are so persuasive and subtle and young people so impressionable and peer influence so all-encompassing. That choice would be almost absent as I would understand it.

[30] The Supreme Court in *Keyes* v. *School District No. 1, supra,* 413 U.S. at 201, (1972) stated that:

> A practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white.

See JA-III at 634.

The record reflects that during the early 1940s, the student body of Wogamon elementary school became predominantly black in part because the Board permitted white students to transfer to predominantly white schools.[31] In June 1945, Wogamon closed with an all white staff and reopened in September 1945 with an all black staff and a black principal.[32] Wogamon subsequently became and presently is an all black school. Similarly, the record reflects that in the 1930s the Willard school became predominantly black due to increased black enrollment and the transfer of white students. The record indicates that in 1934, Willard school had a 50 percent black student body and a faculty which was 38 percent black. The following year, however, the student body became approximately 95 percent black with an all black faculty.[33] By 1947, Willard was 100 percent black in student enrollment and subsequently it has remained a one race school.

Additional evidence also establishes that prior to 1954, the Board pursued a policy of racial separation. Defendants admit that until approximately 1950, "separate facilities, including separate swimming pools and locker room facilities were maintained at Roosevelt [school] for black and white students."[34] In addition, during the late 1940s and early 1950s, defendants operated one race classrooms in officially one race housing projects which the district court found were "strictly segregated according to race."[35]

Upon a review of this evidence, the relevant inquiry is whether at the time of *Brown I,* or any time thereafter, defendants were operating a dual school system in violation of

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[31] *See* Carle admission 4(a), JA-I at 134.

[32] *See* PX 150I, JA-V at 524.

[33] *Id.*

[34] *See* Board admission 7A(a), JA-I at 128; Carle admission 7A(a), JA-I at 135.

[35] Opinion of December 15, 1977, JA-I at 67. *See* PX 143B, JA-V at 510-12; PX 161B, JA-V at 540; JA-I at 194-206.

the Equal Protection Clause of the fourteenth amendment. In *Keyes* v. *School District No. 1, supra,* 413 U.S. 189, the Supreme Court held that in order to establish a violation of the fourteenth amendment in school desegregation cases where no statutory dual system has ever existed, plaintiffs must demonstrate purposeful state imposed segregation in a substantial portion of the school system.[36]

In *Brinkman II, supra,* 518 F.2d at 854, this court held that defendants had been guilty of *de jure* segregative practices. There is ample evidence to support the finding that at the time of *Brown I* defendants were carrying out "a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities."[37] As noted previously, at the time of *Brown I,* approximately 54.3 percent of the black pupils in the Dayton school system were assigned to four schools that had all black faculties and student bodies. In *Keyes, supra,* 413 U.S. 189, the finding that the Denver school board was guilty of intentional segregative acts with respect to schools attended by only 37.69 percent of Denver's black students was sufficient to constitute the entire school district a dual system. The finding of the district court that defendants never had operated a dual school system[38] is clearly erroneous and is based upon misconceptions of the applicable law.

The district court erred both in failing to accord the proper legal significance to the facts extant at the time of *Brown I* and in failing to apply the appropriate presumption and burden-shifting principles of law. The district court failed to attribute the proper legal significance to the deliberate

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[36] Contrary to this clear standard, the district court held that plaintiffs must establish both segregative intent and incremental segregative effect in order to establish a constitutional violation. *See* note 6, *supra,* and accompanying text.

[37] *Keyes* v. *School District No. 1, supra,* 413 U.S. at 201.

[38] *See* note 7, *supra,* and accompanying text.

policy of faculty segregation which, at the time of *Brown I,* made it possible to identify a "black school" in the Dayton system without reference to the racial composition of pupils.[39] The district court also failed to attribute the proper legal significance to the evidence that at the time of *Brown I,* Garfield, Willard, Wogamon and Dunbar schools were deliberately segregated or racially imbalanced due to the actions of defendants. These facts were sufficient to constitute a prima facie violation of the fourteenth amendment under the rule of *Swann, supra,* 402 U.S. at 18[40] and to shift the burden of proof to defendants. The district court also misconstrued the proper approach for determining discriminatory purpose and intent which may be inferred from objective circumstantial evidence[41] and through the use of reasonable presumptions.[42] This court stated in *Oliver* v. *Michigan State Board of Education,* 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975) that:

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies. (citations omitted).

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[39] *See* notes 16-17, *supra,* and accompanying text.

[40] *See* note 17, *supra,* and accompanying text.

[41] *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 264-68 (1977); *Washington* v. *Davis,* 426 U.S. 229, 241-42, 253 (1976).

[42] *See Keyes* v. *School District No. 1,* 413 U.S. at 201-13; *NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1046-47 (6th Cir.), *cert. denied* 434 U.S. 997 (1977); *Oliver* v. *Michigan State Board of Education,* 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

Accord, Arthur v. *Nyquist,* 573 F.2d 134 (2d Cir. 1978); *NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1047-48 (6th Cir.), *cert. denied,* 434 U.S. 997 (1977); *Bronson* v. *Board of Education,* 525 F.2d 344 (6th Cir. 1975), *cert. denied,* 425 U.S. 934 (1976); *Hart* v. *Community School Board of Education,* 512 F.2d 37 (2d Cir. 1975). The evidence clearly establishes that the natural, probable and foreseeable result of defendants' actions was the creation and perpetuation of a dual school system. The district court, moreover, failed to recognize the teaching of *Keyes, supra,* 413 U.S. at 208, that:

> [A] finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true even if it is determined that different areas of the school district should be viewed independently of each other because, even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system.

The district court erred in failing to shift the burden of proof to defendants.

A review of the entire record indicates that defendants have not established that the character of the school system extant in 1954 was the result of racially neutral acts. We emphasize that defendants' intentional segregative practices cannot be

confined in one distinct area.[43] To the contrary, defendants' segregative practices at the time of *Brown I* infected the entire Dayton public school system. There is no doubt that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes, supra,* 413 U.S. at 203, and that the effect of the operation of this dual school system was to maintain other schools in the district as predominantly white.[44]

II. Post-Brown violations

The district court's error in failing to find that defendants were operating a dual school system at the time of *Brown I* resulted also in its failure to evaluate properly the Board's post-*Brown I* actions, which must be judged by their efficacy in eliminating the continuing effects of past discrimination. In *Brinkman I, supra,* 503 F.2d at 704, this court stated:

> Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities 'automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.' *Keyes, supra,* 413 U.S. at 200, 93 S.Ct. at 2693.

Thus, for 24 years defendants have been under a constitutional duty to desegregate the Dayton public schools. *See Penick* v. *Columbus Board of Education,* — F.2d —, Nos.

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[43] The Dayton school system is not divided into "separate, identifiable and unrelated units." *Keyes* v. *School District No. 1,* 413 U.S. at 203 (1972). *Compare Keyes,* in which defendants were found guilty of following a deliberate segregation policy at schools attended by 37.69 percent of Denver's black student population with the instant case in which defendants' purposeful segregative acts affected at least 54.3 percent of Dayton's black student population.

[44] *See* note 30, *supra.*

77-3365-66, 3490-91, 3553 (6th Cir. July 14, 1978) slip opinion at 21. The district court specifically found that "with one exception . . . no attempt was made to alter the racial characteristics of any of the schools" and that the one exception "was in fact a failure."[45] The district court, however, neither charged defendants with the affirmative duty to eliminate the effects of their discrimination nor did it place upon the Board the burden of proving that it had done so. The evidence of record demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination and have intentionally maintained a segregated school system down to the time the complaint was filed in the present case. In addition, the record discloses post-1954 actions which actually have exacerbated the racial separation existing at the time of *Brown I*.

A. Faculty and student assignment practices

In *Brinkman I, supra*, 503 F.2d at 697-98, this court found that defendants "effectively continued in practice the racial assignment of faculty through the 1970-71 school year."[46] This finding is supported by substantial evidence on the record.[47] The finding of the district court to the contrary[48] is clearly erroneous. Rule 52, FED. R. CIV. P. The district court also erred in failing to attribute the correct legal significance to the persistently discriminatory faculty assignment practices as a component of the Board's perpetuation of the dual system extant at the time of *Brown I*. Moreover, the district court

[45] Opinion of December 15, 1977, JA-I at 70, 76.

[46] For a detailed discussion of the Board's post-*Brown I* faculty assignment practices, see *Brinkman I, supra*, 503 F.2d at 697-700.

[47] *See, e.g.*, JA-II 418; JA-III 644-45; PX 4, JA-V 316-17; PX 5A, JA-V 319; PX 5D, JA-V 320; PX 130C, JA-V 508; PX 130D, JA-V 509; board admissions 8, 12-18, JA-I 128-29; Carle admissions 8, 12-18, JA-I 135.

[48] Opinion of December 15, 1977, JA-I at 73.

again failed to recognize this proof of continuing purposeful segregative acts as an element of plaintiffs' prima facie case.[49] The effect of having established this prima facie case should have been to shift to the Board the burden of rebutting the presumption that other practices likewise were undertaken with segregative intent.

For example, in 1962 the Willard and Garfield schools, previously operated for blacks only, were closed and the all black Dunbar high school building was converted into McFarlane elementary school. Most of the children from the Willard and Garfield attendance areas simply were assigned to the McFarlane school which opened with an all black student body and an all black faculty. Some children from the Willard and Garfield areas also were assigned to the all black Miami Chapel and Irving elementary schools. Simultaneously, the new Dunbar high school opened with a virtually all black student body and faculty. Defendants should have been required to rebut the reasonable presumption that the simultaneous assignment of both a predominantly black faculty and student body at these schools was the product of segregative intent and an effort to perpetuate the dual school system extant at the time of *Brown I*.

This error was compounded by imposing upon plaintiffs the additional burden of proving specific causal relationships between the widespread faculty segregation practices and the substantial student segregation existing at the time of trial.

Nowhere in the record do defendants convincingly demonstrate that the systemwide student racial imbalance characteristic of the Dayton public school system since at least the time of *Brown I* likewise was not the product of segregative acts. *Keyes, supra*, 413 U.S. at 210. "[I]t is not enough . . .

[49] *See* note 17, *supra*, and accompanying text. Even at the time this action was instituted, it was possible to identify a "black school" in the Dayton school system without reference to the racial composition of the students.

that school authorities rely upon some allegedly logical, racially netural explanation." *Id.* Defendants here have failed "to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Id.* The Court in *Keyes* noted further that:

> [I]f respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.
>
> *Id.* at 211.

Defendants have failed to establish that their prior segregative acts did not create or contribute to the current segregated condition of the Dayton schools.

In *Brinkman I, supra,* 503 F.2d at 694-95, this court stated that:

> Enrollment data from the Dayton system reveals the substantial lack of progress that has been made over the past 23 years in integrating the Dayton school system. In 1951-52, of 47 schools, 38 had student enrollments 90 per cent or more one race (4 black, 34 white). Of the 35,000 pupils in the district, 19 per cent were black. Yet over half of all black pupils were enrolled in the four *all* black schools; and 77.6 per cent of all pupils were assigned to virtual one race schools. 'Virtual one race schools' refers to schools with student enrollments 90 per cent or more one race. In 1963-64, of 64 schools, 57 had student enrollments 90 per cent or more one race (13 black, 44 white). Of the 57,400 pupils in the district, 27.8 per cent were black. Yet 79.2 per cent of all black pupils were enrolled in the 13 black schools; and 88.8 per cent of all pupils were enrolled in such one race schools.
>
> In 1971-72 (the year the complaint was filed), of 69 schools, 49 had student enrollments 90 per cent or more one race (21 black, 28 white). Of the 54,000 pupils 42.7 per cent were black; and 75.9 per cent of all black students were assigned to the 21 black schools. In 1972-73 (the year the hearing was held) of 68 schools, 47 were virtually one race (22 black, 25 white); fully 80 per cent of all classrooms were virtually one race. (Of the 50,000 pupils in the district, 44.6 per cent were black).
>
> *Every* school which was 90 per cent or more black in 1951-52 *or* 1963-64 *or* 1971-72 and which is still in use today remains 90 per cent or more black. Of the 25 white schools in 1972-73, *all* opened 90 per cent or more white and, if open, were 90 per cent or more white in 1971-72, 1963-64 and 1951-52.

Nowhere in the record have defendants demonstrated that the present systemwide racial imbalance would have occurred even in the absence of their segregative acts. As the Supreme Court noted in *Swann, supra,* 402 U.S. at 26, there is a presumption against schools that are "substantially disproportionate in their racial composition" in school systems with a history of segregation, as in Dayton.[50]

The conclusion that the maintenance of persistent racial imbalance in the Dayton schools was not merely adventitious is bolstered by defendants' use of optional attendance zones for racially discriminatory purposes in clear violation of the Equal Protection Clause.[51] In 1973, the district court determined that some optional attendance zones had been created intentionally for racially segregative purposes and that the zones had demonstrable racial effects.[52] These findings of fact

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[50] In *Keyes, supra,* 413 U.S. at 211, the Supreme Court explicated the reasons supporting this presumption as follows:

> [A] connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.

[51] *See Brinkman I, supra,* 503 F.2d at 695-96.

[52] Opinion of February 7, 1973, JA-I at 5-6.

were affirmed by this court in *Brinkman I, supra,* 503 F.2d at 696, and are supported by substantial evidence. Nevertheless, following remand from the Supreme Court, the district court repudiated these findings, concluding that "[n]o evidence has been presented suggesting that attendance zones were redrawn to promote segregation"[53] and that the zones had no segregative effect.[54] In reaching these clearly erroneous findings of fact, the district court once again failed to recognize the optional zones as a perpetuation, rather than an elimination, of the existing dual system; failed to afford plaintiffs the burden-shifting benefits of their prima facie case; and failed to evaluate the evidence in light of tests for segregative intent enunciated by the Supreme Court, this court and other circuits in decisions cited in this opinion.

B. School construction and site selection

The evidence of record establishes that of 24 new schools constructed between 1950 and the time this action was instituted, 22 opened 90 percent or more black or white.[55] During the same period, 78 of the 86 additions of classroom space for which racial compositions are known were made to schools 90 percent or more one race.[56] Coupled with these practices were some instances of the coordinate racial assignment of professional staffs to these schools and additions on the basis of the racial composition of the pupils served by the schools.[57] This court noted in *NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1056 (6th Cir.), *cert. denied,* 434 U.S. 997 (1977) that "[s]chool contruction which promotes

[53] Opinion of December 15, 1977, JA-I at 75.

[54] *See generally* JA-I at 81-91.

[55] *See* PX 4, JA-V 316-317; JA-III 562-63.

[56] JA-III at 649-50.

[57] *See* PX 4, JA-V 316-17; JA-III 644, 794-96; JA-IV 927-28.

racial imbalance or isolation is an important indicium of a *de jure* segregated school system." *See Oliver* v. *Michigan State Board of Education, supra,* 508 F.2d at 184. *See generally United States* v. *School District of Omaha,* 521 F.2d 530, 543-46 (8th Cir. 1975), *cert. denied,* 423 U.S. 946 (1976). In the face of this, the district court failed to infer purposeful segregation from this pattern of school construction which unmistakeably increased or maintained racial isolation.[58] Again the district court failed to recognize that plaintiffs had established a prima facie constitutional violation which shifted the burden of proof to defendants. Instead, the district court concluded that plaintiffs had failed to show that defendants' site selection and construction practices "had a segregative purpose or . . . had an incremental segregative effect upon pupils, teachers, or staff."[59] These findings of fact are infected by legal error and are clearly erroneous. As detailed previously, the post-*Brown I* practices of racially motivated faculty assignments to new schools bespeaks a concomitant segregative intent in the location of new schools and additions. Nowhere in the record have defendants established that their school construction and site selection practices and the simultaneous racially motivated assignment of teachers were the product of racially neutral policies. Defendants have failed "to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Keyes supra,* 413 U.S. at 210.

The district court's conclusion that defendants' school construction and site selection practices had no segregative effect

[58] We note that:

> While it is true that a court may *infer* such an intent from the circumstances there is no authority for the proposition that such an intent *must* be inferred in all cases where segregated patterns exist in fact. The inference is permissible, not mandatory. (emphasis in original).

Higgins v. *Board of Education,* 508 F.2d 779, 793 (6th Cir. 1974).

[59] JA-I at 97.

likewise is clearly erroneous. Instead of meeting their affirmative duty to disestablish the dual school system extant at the time of *Brown I* and to diffuse black and white students throughout the Dayton school system, defendants pursued a policy of containment through school construction and site selection practices. As noted previous, at the time of the initial hearings in this case, approximately 80 percent of all classrooms in the Dayton school system were virtually one race. On the basis of the evidence of record, the conclusion is inescapable that defendants' school construction and site selection practices were segregative in effect.

C. Grade structure and reorganization

Appellants' principal objection in this area is to the establishment in the 1971-72 school year of a middle school system which allegedly had a segregative effect. In a report issued in 1971, the Ohio Department of Education characterized the middle school system as the apparent addition of

> one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur.
>
> PX 12, JA-V at 454.

The report further opined that:

> Of the five sets of schools currently involved in the process of conversion to feeder and middle schools, the following seems to be occurring:
>
> 1. two sets of schools will be totally black;
> 2. racial isolation will actually be increased in one set of schools; and
> 3. only in the Dayton View area, which was previously integrated, could conversion to middle schools possibly result in reduction of racial and economic isolation and insulation.
>
> *Id.*

Unrebutted testimony concluded that the effect of the middle school system was to increase or maintain segregation rather than to eradicate it in accordance with defendants' affirmative duty to disestablish the dual system.[60] The district court found that the middle schools had both "a segregative effect and an integrative effect."[61] Nevertheless, the district court concluded that plaintiffs had failed to establish segregative intent in the establishment of the middle schools. This finding is questionable in light of plaintiffs' convincing demonstration that the natural, probable, and foreseeable result of the establishment of the middle schools was an increase or perpetuation of segregation. The district court failed to recognize the middle school system as one of the areas in which defendants failed to disestablish Dayton's dual school system.

Upon consideration of the record, the conclusion is inescapable that, rather than eradicate the systemwide effects of the dual system extant at the time of *Brown I*, defendants' racially motivated policies with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization perpetuated or increased public school segregation in Dayton. Thus, defendants have utterly failed to comply with their ongoing 24 year obligation to desegregate the Dayton public schools, *Penick* v. *Columbus Board of Education*, *supra*, slip opinion at 21, and, in addition, have committed affirmative acts that have exacerbated the existing racial segregation. The remedy directed in this opinion is made neces-

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[60] *See* JA-III at 646.

[61] Opinion of December 15, 1977, JA-I at 77.

sary by: (1) the failure of defendants to disestablish the pre-1954 segregated school system; and (2) post-1954 acts of systemwide impact which have contributed affirmatively to the continuation of a segregated system.

III. Remedy

In *Dayton Board of Education* v. *Brinkman, supra,* 433 U.S. at 420, the Supreme Court stated that upon finding a constitutional violation:

> [T]he District Court in the first instance, subject to review by the Court of Appeals, must determine how much *incremental segregative effect,* these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes,* 413 U.S. at 213.
>
> (emphasis added).

Contrary to the conclusion of the district court,[62] we are convinced that the term "incremental segregative effect" used by the Supreme Court in the *Brinkman* decision, was not intended to change the standards for fashioning remedies in school desegregation cases. *Penick* v. *Columbus Board of Education, supra,* slip opinion at 12, 58; *NAACP* v. *Lansing Board of Education,* — F.2d —, (No. 76-2005 6th Cir., Feb. 8, 1978), *cert. denied,* — U.S. —, 46 U.S.L.W. 3787, (June 27, 1978). The purpose of the remedy is to eliminate the lingering effects of intentional constitutional violations and to restore plaintiffs to substantially the position they would have occupied in the absence of these violations. The word "incremental"

[62] *See* JA-IV at 909; opinion of December 15, 1977, JA-I at 103.

merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is "incremental" in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution.

The district court committed two errors in its approach to this inquiry. First, it individually examined each alleged constitutional violation as if it were an isolated occurrence and sought to determine the incremental segregative effect of that occurrence. In *Keyes, supra,* 413 U.S. at 200, the Court stated:

> We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) (*Brown I*), the State automatically assumes 'an affirmative duty to effectuate a transition to a racially nondiscriminatory school system,' *Brown* v. *Board of Education,* 349 U. S. 294, 301 (1955) (*Brown II*), see also *Green* v. *County School Board,* 391 U. S. 430, 437-438 (1968), that is, to eliminate from the public schools within their school system 'all vestiges of state-imposed segregation.' *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15 (1971).

The district court's act by act approach is no more valid than the school by school approach rejected in *Keyes.* As this court noted in *Penick, supra,* slip opinion at 58:

> *Dayton* does not . . . require each of fifty segregative practices or episodes to be judged solely upon *its* sepa-

> rate impact on the system. The question posed concerns the total amount of segregation found – after each separate practice or episode had added its 'increment' to the whole. It was not just the last wave which breached the dike and caused the flood.

Secondly, the district court erred in allocating the burden of proof on the issue of incremental segregative effect to plaintiffs, requiring them to establish both racial discrimination and the specific incremental effect of that discrimination. Where plaintiffs prove, as here, a systemwide pattern of intentionally segregative actions by defendants, it is the defendants' burden to overcome the presumption that the current racial composition of the school population reflects the systemwide impact of those violations. *See Keyes, supra,* 413 U.S. at 211 n. 17. Nowhere in the record have defendants rebutted this presumption. Since the district court failed to apply the proper legal standards, we independently consider the incremental segregative effect of defendants' most egregious practices. In so doing, we are mindful that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes, supra,* 413 U.S. at 203. First, the dual school system extant at the time of *Brown I* embraced "a systemwide program of segregation affecting a substantial portion of the schools, teachers, and facilities"[63] of the Dayton schools, and, thus, clearly had systemwide impact. *See Penick* v. *Columbus Board of Education, supra,* slip opinion at 59-60. Secondly, the post-1954 failure of defendants to desegregate the school system in contravention of their affirmative constitutional duty obviously had systemwide impact. *Id.* at 60-61. The impact of defendants' practices with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization clear-

[63] *See* note 37, *supra,* and accompanying text.

ly was systemwide in that the actions perpetuated and increased public school segregation in Dayton.

We hold further that each of defendants' policies and practices detailed in this opinion added an increment to the sum total of the constitutional violations.

Finding that the constitutional violations before the court have a systemwide impact, *Brinkman, supra,* 433 U.S. at 420, we conclude that the systemwide desegregation plan approved by this court in *Brinkman III, supra,* 539 F.2d 1084, should be reinstated. This remedy is "tailored to undo the violations of plaintiffs' constitutional rights . . ." and is "designed to redress" the effect of the violations found. *NAACP* v. *Lansing Board of Education,* – F.2d –, *supra,* (No. 76-2005, 6th Cir. Feb. 8, 1978), *cert. denied,* – U.S. –, 46 U.S.L.W. 3787 (June 27, 1978). The decision of the district court is reversed. It is ordered that the desegregation plan approved by this court in *Brinkman III, supra,* 539 F.2d 1084, be and hereby is reinstated and shall remain in effect during the 1978-79 school year. Plaintiffs-appellants shall recover the costs of this appeal from the Dayton Board of Education. The case is remanded to the district court for further proceedings not inconsistent with this opinion.

Supreme Court, U. S.
FILED
MAR 3 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume I

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend,
Donna Brinkman, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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Petition For Certiorari Filed October 13, 1978
Certiorari Granted January 8, 1979

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7-23-73	Plaintiffs file notice of appeal with District Court.
8-13-73	Defendants Dayton Board, et al., file notice of appeal with District Court.
8-20-74	Court of Appeals issues opinion affirming District Court's holding of a cumulative violation and remands for formulation of an adequate desegregation plan.
1-7-75	District Court issues order requiring submission of plans.
2-3-75	Plan of Dayton Board filed with District Court.
2-3-75	Alternative plan of plaintiffs filed with District Court.

2-17-75 to 2-20-75	District Court holds hearings on plans submitted.
3-10-75	District Court issues order on remedy.
3-18-75	Plaintiffs file notice of appeal with District Court.
6-24-75	Court of Appeals issues opinion and remands action to District Court.
11-5-75	District Court Order requiring Dayton Board to submit plan on or before 12-1-75 and appointing Dr. John A. Finger as consultant.
11-18-75	Order of District Court relating to establishment of guidelines for plan.
12-2-75	Dayton Board submits desegregation plan to District Court for consideration.
12-8-75 to 12-9-75	District Court held hearing on plans submitted to Court.
12-29-75	District Court's order and judgment ordering redistribution of pupils and appointing Dr. John A. Finger, Jr. as Master.
1-2-76	District Court's supplemental order correcting factual issue in 12-29-75 order.
1-8-76	Motion filed with District Court by Dayton Board to alter or amend judgment.
3-15-76	Master files report with District Court and hearing set.
3-22-76 to 3-23-76	District Court held hearings on report of Master.
3-23-76	District Court's final order relating to desegregation plan.

3-25-76	Judgment entry of District Court embodying order of 3-23-76 filed.
4-15-76	Notice of appeal filed by Dayton Board with District Court.
4-15-76	Application of Dayton Board for stay.
4-19-76	Order of District Court denying stay.
5-11-76	Application of Dayton Board to District Court for modification of report of Master.
5-14-76	Order of District Court granting modification except as relates to eighth graders.
6-1-76	Motion of Dayton Board directed to Court of Appeals to stay judgment.
6-16-76	Order of Court of Appeals denying stay.
7-26-76	Order of Court of Appeals affirming District Court's judgment of March 25, 1976.
7-28-76	Motion of Dayton Board directed to Court of Appeals to stay judgment pending writ of certiorari.
8-16-76	Order of Court of Appeals denying motion for stay.
8-17-76	Application to Associate Justice of Supreme Court for stay.
8-19-76	Request for stay denied by Associate Justice; writ of certiorari filed with Supreme Court.
10-27-76	Request for certification and transmittal of record filed with District Court.
1-17-77	Petition for writ of certiorari granted by Supreme Court.
6-27-77	Decision of Supreme Court remanding for further proceedings.
8-25-77	Order of Court of Appeals remanding to District Court.

11-3-77 Hearings held by District Court

12-15-77 Order of District Court dismissing Complaint.

12-28-77 Plaintiffs file Notice of Appeal.

1-5-78 Order of District Court denying stay.

1-16-78 Order of Court of Appeals granting stay.

7-27-78 Court of Appeals issues opinion ordering reinstatement of system-wide desegregation plan.

8-21-78 Court of Appeals denies stay request of Dayton Board.

8-28-78 Justice Stewart denies stay request of Dayton Board.

8-30-78 Justice Rehnquist denies stay request of Dayton Board.

10-13-78 Petition for writ of certiorari filed with Supreme Court.

12-8-78 Request for certification and transmittal of record filed with District Court.

1-9-79 Petition for writ of certiorari granted by Supreme Court.

II. OPINIONS BELOW

The opinions are found in the Appendix to the Petition for Writ of Certiorari filed in October, 1978.

III. RELEVANT RULINGS AND MOTION.

A. RULING OF TRIAL COURT MADE AT OPENING OF HEARING ON VIOLATION HELD IN NOVEMBER AND DECEMBER OF 1972.

[R. I. 1-2, Vol. 1] THE COURT: Before we commence, gentlemen, I would like to make a statement for the record and then you may make your responses. This is a limited hearing on this case and it is intended to be a preliminary inquiry. I want you gentlemen to understand if it develops in this inquiry that later hearings are necessary, they will be held. At this time however, we are going to inquire only into the question that was discussed with counsel at the pretrial hearing. We are going to inquire of whether or not acts by the School Board of Dayton have created a segregated school system.

At this time, we are not going to inquire into the questions regarding the so-called State Defendants unless there is a showing that their activities in some fashion contributed to or were acts with the School Board of Dayton.

• • •

B. MOTION OF DAYTON BOARD RELATING TO STANDING.

[R. I. 1717, Vol. 17] We would move further for a directed verdict on the ground that there has been a failure of proof that the Plaintiffs in this action are members of the class which they purportedly represent or that this action is properly maintable as a class action under Rule 23.

• • •

C. RULINGS OF TRIAL COURT MADE AT REMEDIAL HEARINGS IN DECEMBER OF 1975 AND MARCH OF 1976.

[R. III. 52-55] Q. On page 16 you make the statement about declining enrollment is common these days to schools throughout the nation. This is at the top of the page. Then you conclude that the figures just presented suggest, however, and I am not sure what you mean by however an inordinate drop in the white student population, some of which must be attributed to a continued move to the suburbs. That continued to move to the suburbs is not something that results from the desegregation order, is it?

That has been going on in Dayton for the last 20 years?

A. It was established today approximately 11,000 white youngsters and 900 black youngsters have left Dayton in the last five years.

Q. There has been a substantial out white migration in most urban centers; is that correct?

A. Yes.

Q. And that is without regard to desegregation; is that correct?

A. Yes, it has been going on. In some instances with desegregation and in some instances without.

Q. In the 20 major cities of this country, has there been any court orders bussing or pairing or clustering of schools that resulted in white out-migration in the last 20 years?

THE COURT: Mr. Lucas, assume it either way. Assume that a court order has decimated the schools, or assume it has had no effect. Of what significance is that? These are social problems that I don't really feel the Court should enter into. Whatever the effects of desegregation may be or whatever the effects of the court order, this isn't a matter of choice. We have passed the point in this case where these things are relevant.

MR. LUCAS: Your Honor, the only relevance that I possibly see, and I basically agree with the Court, is their reason

for not using pairing and clustering as I understood it was because it produces this type of phenomena, and then they cite some bogus statistics about Professor Coleman, which he since recounted, and other so-called authorities to support that proposition.

To the extent they are relying on it, I think it is significant to demonstrate the truth or falsity of the position.

THE COURT: I don't really think it is worth the time, Mr. Lucas. Would you proceed, please?

BY MR. LUCAS:

Q. In fact, Dr. Gordon, isn't that the reason why your team was told by the Board to reject the alternative of pairing and clustering?

THE COURT: I would suggest, Mr. Lucas, that you proceed to something elese. I am simply not interested in this.

MR. LUCAS: Your Honor, I think it is essential that we know why the desegregation has been rejected, whether it is a good reason or bad reason.

THE COURT: Mr. Lucas, it may well be that we see these hearings in different lights. I would ask that you proceed to another matter.

BY MR. LUCAS:

Q. Dr. Gordon, why did you reject pairing and clustering?

THE COURT: Mr. Lucas, I would ask you to proceed to another matter.

MR. LUCAS: Your Honor is instructing me I may not ask —

THE COURT: Mr. Lucas, you have been instructed. Would you proceed to another matter?

MR. LUCAS: I just wanted the record to be clear.

THE COURT: I am sure the record is abundantly clear, and, Mr. Lucas, if I must tell you a third time, I will do so. Proceed to another matter.

MR. LUCAS: May I make an offer of proof?

THE COURT: You may at a recess.

MR. LUCAS: I will do that then.

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[R. III. 126-131] Q. In looking at page 196, look at letter "h". The statement is made there that there are great differences in white flight among cities. No one knows the policies (local/state, etc) which help control white flight. Would you agree with that?

A. Yes, I would agree with that. I don't know of any definitive studies that would predict when white flight would occur.

Q. Do you agree the white flight concept is to some extent a self-fulfilling prophesy when school boards predict it?

A. I think that influences some, yes. How many, I don't know.

Q. Are you aware that most of the so-called white flight in the country has taken place totally without regard to school desegregation?

A. I am not aware of that, no.

Q. What studies are you familiar with about white flight?

A. Very few.

THE COURT: Mr. Lucas, let me direct a question to you. Let's assume that a plan that will meet with the requirements of the remand encourages white flight and another one that does not meet with the requirements of the remand does not. Are you suggesting this Court has any choice?

MR. LUCAS: No, sir, I am not.

THE COURT: I was unaware of it also, and I was curious about this. Assume it either way. Assume that the differing plans will accelerate or decelerate white flight. This isn't a problem for the Court, is it? Isn't the Court required to approve a plan that will desegregate the schools?

MR. LUCAS: Your Honor, I think what the Court has to measure in deciding what plan to approve or what changes to make and so forth is whether or not rejecting particular alternatives the Board has done so on a basis which is legally proper, or whether or not that rejection, the choice of a less effective or an alternative which is demonstrably capable of actually desegregating the system is based on an impermissible factor. That is what Green spoke to. It may reflect on the

intentions of the body in particular instances. So, that is the purpose of the inquiry.

THE COURT: I don't see whether or not a plan will accelerate white flight which is obviously at this point speculative at best, no one is prepared to say what will, in fact, happen, and —

MR. LUCAS: Well, the defendants have, your Honor.

THE COURT: Let me finish, please. I am just concerned about the utility. It seems to me that the choice here does not bear upon social questions. The choice here depends upon effective desegregation, and this seems to me to be a social problem, and one that the Court is not confronted with.

MR. LUCAS: I think the theorum the Court is being presented with here is that plaintiffs' plan will obviously desegregate. They have rejected using the technique that plaintiffs' plan uses to desegregate because they say, and I am not agreeing with them, but they say it will cause white flight.

THE COURT: Well, your point, Mr. Lucas, as I look upon that, is irrelevant. I look upon these plans as to whether they, in fact, desegregate the schools, and that is all that I look to.

Now, it is appearing to me at this point I have a choice between techniques, because apparently both plans will accomplish the same purpose, and if they do then I would concern myself only with those things that are judicial in nature and not those which are social in nature.

MR. LUCAS: What we are suggesting is perhaps one of the plans before the Court is not capable of a determination that it will, in fact, desegregate the schools, and that is the issue we are testing here obviously for the next period of time, if you decide we may.

THE COURT: I don't think that is the criterion. I suspect, Mr. Lucas, that a question I addressed earlier to Dr. Gordon may be the key question, and that if the Court determines what I said is the bottom line, that is what the school components will be, that is going to be the test of whether a school is desegregated if I read Swan and Keyes correctly.

Now, this I believe is really a collateral question. It might

well be this white flight could be supported by some view as being a good thing. I don't know, and I could care less. I don't see that in terms of these plans of the preferability of one over the other whether it accelerates or decelerates that condition. I don't see that as a judicial consideration.

MR. LUCAS: Your Honor, I agree that the goal, the bottom line as you expressed it, is the purpose of us being here. The question I think that has to be measured is whether or not a particular plan is calculated, reasonably calculated to lead to that goal, subject to the Swan limitations, reasonable travel time and things of that sort. I am not sure that educational soundness, whatever that may mean, is one of the criteria. Mr. Greer keeps suggesting that is one of the three criteria.

I think health, safety and welfare of the child perhaps includes that, but I think the Court is correct getting into the educational theory, what is educational and educationally sound is a judgment that the Court indeed may not make.

THE COURT: I likewise feel that social problems are judgment calls that the Court may not make. I think that may be critical to our entire view of this problem. I see this as a judicial question regarding deprivation of constitutional rights. I don't see it in terms of social goods or social evils. That simply is not for a Court to determine.

MR. LUCAS: Well, my only purpose in examining is to test their theory as to why they rejected a proven effective method of desegregating schools.

THE COURT: I am prepared to assume it either way you prefer, Mr. Lucas, either that the Board's plan will accelerate white flight or that it will decelerate it, and I am prepared to consider your plan either way, and I still come out to the conclusion that that can't be relevant to the determination.

MR. LUCAS: I am really in agreement with the Court.

THE COURT: I would assume so.

MR. LUCAS: What I am arguing is they have used an irrelevant determination to reject a valid technique. That is where I am.

THE COURT: And I am prepared to agree with that. Now, let's go forward.

MR. LUCAS: Thank you, sir.

THE COURT: I am prepared to agree that they may have, but as I say, it doesn't make much difference.

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IV. RELEVANT PORTION OF STATEMENT OF PLAINTIFFS' COUNSEL MADE AT OPENING OF HEARING ON VIOLATION HELD IN NOVEMBER AND DECEMBER OF 1972.

[R. I. 11, Vol. 1] Further, it is not in controversy in this cause that the Dayton Board of Education in December of 1971 eliminated all the boundary lines which the Court sees on that map, and that it called for the adoption, according to certain criteria, of a desegregation plan but it first voided every one of those boundary lines and that the present Dayton Board of Education on January 3, 1972, reestablished the boundaries, in effect drew boundaries for the Dayton School System which boundaries are the same which result in the patterns of segregation which are reflected in the agreement as to the statistical enrollments in the schools at that time.

But for the action of the Board on January 3, those boundaries would not exist as they exist today.

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V. RELEVANT DESEGREGATION PLANS FILED WITH DISTRICT COURT.

A. PORTION OF PLAN SUBMITTED BY DAYTON BOARD IN COMPLIANCE WITH ORDER OF FEBRUARY 7, 1973.

(Title omitted in printing).

I. ELIMINATION OF OPTIONAL ZONES

A. Procedures

1. General

a. All students new to the changed district will be required to attend the newly designated school.

b. Students *may* change to the newly designated school in September, 1973.

2. High School Students

a. Students now attending high school may continue in their present school.

b. Any student who has completed the tenth grade who changes his or her address within the school district during the summer or the school year, may continue in the high school zone where originally enrolled.

3. Elementary School Students

a. Students in present grades K through five must change to newly designated district.

b. Students in present grades six and seven *may* remain in present school.

c. Any student who has completed the seventh grade in a school zone containing a K-8 school or any student who has completed the fourth grade in a school zone containing a K-5 school who changes his or her address during the summer or the school year may continue in the school.

B. Optional Area Changes

1. Elementary

a. **Bell Haven – Ft. McKinley**

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b. **Valerie – Ft. McKinley**

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c. **Residence Park – Jane Addams**

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d. **Horace Mann – Lincoln**

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e. **Cleveland – Belmont Elementary**

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f. **Grant – Belmont Elementary**

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g. **Lewton – Eastmont**

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h. **Westwood – Jackson Schools**

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i. **Westwood – Carlson**

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j. **Carlson – Wogaman**

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k. **Highview – Wogaman**

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l. **Highview – Carlson**

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2. High School

a. **Fairview – Roth**

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b. **Belmont – Wilbur Wright**

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c. **Colonel White – Kiser**

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d. **Colonel White – Roosevelt**

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II. FREEDOM OF ENROLLMENT PRIORITIES

A. Revised Freedom of Enrollment Policy

1. Transfer Within District

The parent of a pupil in good standing enrolled in the Dayton Public School District may request assignment of the pupil to any school building within the district where space may be available to accommodate him. Such requests will be granted according to the following procedures:

a. Students residing within the attendance area of a school building shall have *first* priority to assignment to that building.

b. A student desiring enrollment in any building for whatever reason shall have *second* priority in that building providing his enrollment will contribute to improved racial balance in that building and providing that such transfer will not adversely affect the racial balance of the sending school. Schools will be considered racially balanced if they reflect the over all racial composition of the Dayton School District.

c. Students meeting the requirements for a course available only in the particular building shall have *third* priority for attendance in that building and all students enrolling under this priority for the first time commencing with the 1973-74 school year and each year thereafter shall return to their home school upon completion of the course.

d. Transfer to another school within the city will be made only at the beginning of the first semester.

e. A permit to attend a school outside the attendance area of residence is valid until the end of the school year for which it is issued. It is *renewable on a year-to-year* basis depending upon availability of space in the receiving school. A student requesting renewed assignment shall have priority over new transfer requests. Students now attending a school building under the freedom of enrollment policy may continue their attendance in the assigned building where there is available classroom space without re-submitting an application. However, elementary graduates under the freedom of enrollment policy desiring a transfer for the purpose of meeting requirements for a course or improving racial balance must re-submit an application.

f. Excepting those students returning to their home schools upon completion of a course, students desiring to return to their home school district may do so at the end of the school year, unless an emergency situation arises, and will not be eligible for further free enrollment transfer.

g. An application for transfer may be obtained from the principal of the home school district or the Student Relations Office. All requests for transfer shall be mailed or delivered by the parent to the Student Relations Office for action.

h. Transportation will be the responsibility of the Board of Education for all students eligible and approved for transfer and who voluntarily transfer under Option b where racial balance is improved in the receiving school.

i. This transportation is granted on the same basis as other students being transported. Thus, elementary and middle school children who reside more than 1.5 miles from their schools of attendance, and high school students who live beyond 2 miles and are unable to obtain public transportation that will get them to the school of attendance within one hour, will be eligible.

2. Student Exchanges Within the City

a. Any two pupils, or group of pupils, attending schools within the district may voluntarily exchange places for a semester or a year if such exchange will improve the racial balance in the receiving schools and does not adversely affect the racial balance of the sending school.

b. Procedures shall be the same as for transfers as enumerated above.

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III. FACULTY ASSIGNMENT PRACTICES

Faculty assignments for each school in the Dayton Public Schools shall continue to reflect a racial composition that approximates the ratio of black to white faculty in the entire school system. The Superintendent of Schools is specifically charged with the duty of seeing that this policy is implemented.

Faculty personnel shall continue to be hired on a nondiscriminatory basis. It is the intent of the Dayton Board that every reasonable effort will be utilized to in-

sure that the percentage of black faculty, as related to the entire faculty in the system, will continue, at a minimum, at the approximate level that has existed in the system since 1970.

IV. HIRING POLICIES FOR CLASSIFIED PERSONNEL

A. Clerical, Custodial and Food Service Staff

The racial characteristic for the City of Dayton as reflected in the 1970 census tract is 31.0% black. The racial characteristic for the Dayton Public Schools is somewhat less than this since the zones embodying schools lying outside the City of Dayton are predominantly white in their racial composition.

The clerical staff of the Dayton Public Schools is currently 65% white and 35% black.

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The custodial staff of the Dayton Public Schools is currently 52% white and 48% black. The Food Service Staff presently employs 304 persons. Of these, 181 are white and 123 are black, with a ratio of 60% white and 40% black.

As for the clerical, custodial and food service employees, it is the policy of the Board that the employment of black minorities in these positions will continue to reflect the proportion of the black to white population residing within the Dayton School District.

B. Maintenance Staff

In December of 1972, the supervisor of the maintenance and transportation division, who was white, resigned. This vacancy was subsequently filled by a qualified black supervisor.

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In October of 1972, the Dayton Board of Education entered into a bargaining agreement with the Building Trades Council. A provision in this agreement created a new classification entitled "pre-apprentice trainee". Through the use of this classification, the Dayton Board resolves to integrate the maintenance staff.

Before June 15, 1973, the Board will hire five "pre-apprentice trainee" minority craft employees. Two electricians, two plumbers and one glazier will initially be employed.

Since there are presently eight maintenance craftsmen who have attained age 60 or beyond the opportunity for further minority employment will exist upon the retirement of these craftsmen. Additionally, further opportunity for minority employment will exist if the maintenance department is expanded or any existing craftsman terminates his employment with the Dayton Board.

It is the intent of the Dayton Board to integrate each union craft in the maintenance division. Every reasonable effort will be utilized to employ minority craftsmen, apprentices or "pre-apprentice trainees" in order that the black to white ratio within each craft approximates the proportion of black to white population residing within the Dayton School District.

V. SCIENCE ENVIRONMENTAL PROGRAM

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This plan proposes the establishment of a city-wide elementary science program guided by a trained staff of about 50 persons working in four centers. These staff members will be selected from the most active and innovative science teachers in the Dayton Public schools.

About 11,000 pupils in grades 5 through 8 and their teachers will make a field trip once every two weeks to a center designed and staffed to provide training and experiences as briefly described herein.

About 500 high school students will participate in the centers on a credit basis, to assist younger students in learning to use the science skills in solving problems.

Students in grades 1-4 will visit a science center once or more during the year.

A science-mobile will be used by students to simulate environments too distant to reach.

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The specific content of the program will be developed and promoted by cooperative effort of social studies and science specialists of the curriculum development department. The program will concentrate on concepts that relate to the natural environment, to the use man has made of the products of nature, and to man himself. In the program, these concepts may mingle in any one learning experience, so that the program becomes multi-disciplinary in implementation.

Children will be transported to the Environmental Centers on buses. A trained aide, speaking on an audio-equipped bus, will point out places of interest as the bus moves from the neighborhood school to the Center. Bus trips will vary for a class from time to time with routes chosen so that children may get comprehensive views of the entire city. Audio equipment on alternate backs of bus seats will encourage pupils to interact with the guides. The bus driver and the bus travel resource aide will serve as para-professionals in the course of the day's program.

Activities will vary with the grade level of pupils involved and the program planned for the day. Activities for the elementary grades will be directed toward a general ecological approach for developing environmental awareness. A multi-sensory approach will be used so that the pupil will be more "totally" involved in the activities. Trails and sites will be selected to meet the program needs which have been planned for the day.

Teachers of participating students will become part of the teaching team and will gain expertise in the ways to follow up activity in their home schools.

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The visiting students will be scheduled so as to represent a racial and socio-economic mix similar to that of the entire school district.

VI. PATTERSON-STIVERS VOCATIONAL HIGH SCHOOL

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Beginning in September of 1973 the facility presently designated as Stivers High School will be converted, over a three year period, to a co-operative vocational facility which will be known as the Stivers campus of the Patterson-Stivers Vocational High School. Ninth and most tenth grade students selected for the vocational program will be enrolled at the Stivers campus. The remaining tenth grade and all eleventh and twelfth grade vocational students will attend the Patterson campus (presently the facility housing Patterson Co-operative High School).

The students currently enrolled in grades nine through eleven at Stivers High School and the students of those classes moving into this geographical zone during such three year period will continue to attend Stivers until their respective classes graduate. As of September, 1973 all students residing within the present geographic boundaries of Stivers, with the exceptions as noted above will be assigned on an equitable and non-racial basis to Wilbur Wright and Belmont Highs Schools. The resulting realignment of the Stivers boundaries will provide for increased integration in the two receiving schools.

VII. THE MUSICAL STEREOPTICON

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The immediate objective is the formation of an elementary and high-school all-city band orchestra and chorus. Each performing group will participate in concerts and joint musical ventures with other students of similar interest and proficiency from all schools within the district.

Based upon the successful implementation of the foregoing musical groups it is proposed that the program be expanded in subsequent years to embrace additional musical involvement of students, parents, and citizens. Envisioned at the present time are combined school marching bands (with joint marching performances), joint school pep bands, rock groups, gospel choirs, jazz lab bands, and musical theater groups. The program will be expanded to add one of these groups annually over a six year period.

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Student participation in each group, will be based primarily upon ability and each group shall contain both black and white students. Prospective student members must be members of the musical group of their own school and will be selected for membership in the all-city performing group by the school director.

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VIII. INTEGRATED ATHLETICS

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1. All elementary schools having no minorities on their squads will be required to schedule league or non-league contests with schools that do have such minorities represented. All elementary principals and coaches will be apprised of plans before league organizational

meetings are held in the fall of next school year. At that time this plan will be built into each league schedule.

2. Middle school principals and coaches will make up their athletic schedules. Such athletic schedules must meet the requirements set forth in paragraph 1 above. Because of location of middle schools in different parts of the city the middle school league will present a well-integrated schedule.
3. All high school league schedules will be administered from central athletic office to insure that racial isolation does not exist. In city championship meets all high schools will be entered against all other high schools.
4. Scheduling of all future invitational tournaments of any interscholastic sport will be done in a manner so that the participating schools will represent a cross section of the total Dayton community.

IX. MINORITY LANGUAGE PROGRAM.

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The purpose of a minority language program is to educate teachers and other school personnel to recognize specific legitimate linguistic differences that exist in many varieties of American English. This knowledge should aid teachers in the tasks of teaching reading and writing (in standard English) to pupils of different cultural backgrounds.

X. LIVING ARTS CENTER

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Students enrolled in the Living Arts program are self-selected. Interest, desire, enthusiasm, creative potential and a personal interview are the criteria for acceptance. During the spring semester of 1972, 843 students were enrolled in the program. Currently, the non-white enrollment approximates thirty-five per cent of the entire

enrollment. Including in-school workshops, combined programs at the center reach an average of 2,000 students per week.

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Basically, the Living Arts Center consists of five separate departments; art, creative writing, dance, and drama.

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XI. CONTROL CENTERS.

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A. Security — Rumor Control Center

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To accomplish such an educational program, an atmosphere and climate must be established within the schools which will be a supportive adjunct to the educational program. Community — school — parent involvement must become a constructive force in meeting problem situations and dispelling rumors. An organized ongoing Security-Rumor Control Center should assist in creating the climate necessary to meet the challenges of modern, universal, quality education.

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B. School Guidance Centers

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The Board of Education and staff of the Dayton Public School System are committed to providing a quality educational program for every boy and girl in the District. This philosophy includes all the children of all people, emphasizes the need to reduce school dropouts, and provides a program suited to each student's needs.

Historically, this aim has not been reached, and many students have found the school irrelevant to their needs. These students have dropped out or failed to enroll at all. In other cases economic deprivation has influenced

parents to withhold students from school. The conditions which create these problems must be attacked and the students who are being deprived of the opportunity for an education *must* be taught.

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C. Area Learning Centers

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The Learning Centers will be operated for students between the ages of thirteen through nineteen commencing with the 1974-75 school year. Young people who apply between the ages of nineteen through twenty-one, could be accepted with approval. One Center will be designated for students between the ages of thirteen through fifteen (generally grades 6th, 7th, and 8th), and the other Center will accommodate students between the ages of sixteen through nineteen and others who qualify with approval. The Centers will be for students whose parents or guardians are residents of the Dayton Public School District. The Centers are conceived to meet the individual needs of school dropouts or those deemed potential dropouts by their home school principal.

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D. Dayton Vocational School

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It is proposed that the Dayton Vocational School proposal will become a reality at the start of the 1974-75 school year. Educational training in occupational-type work is offered to suit various student needs and abilities at the Dayton Vocational School. *Coordinated Vocational Academic Education* is being provided for young men between the ages of fifteen and twenty-one, while *Vocational Rehabilitation Training* is offered for another

group composed of both young men and young women ages sixteen to twenty-one.

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B. PORTION OF PLAN SUBMITTED BY DAYTON BOARD IN COMPLIANCE WITH ORDER OF JANUARY 7, 1975.

(Title omitted in printing).

APPENDIX A

STAFFING

In 1969 the Dayton Board of Education indicated its intent to have the racial composition of the staff of each school in the district reflect the ratio of the black-white composition of the staff in the entire system. Although the goal has been attained, the Board recognizes the need for the continuance of this staffing policy. Consequently, the Board reaffirms that staffing assignments in each school will continue to reflect a racial composition that approximates the ratio of the black-white composition of the staff for the entire district.

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APPENDIX B

TEACHER IN-SERVICE

The purpose of teacher in-service as a segment of the desegregation plan is to provide training which enables teachers to work more effectively in newly desegregated situations. An estimated 200 teachers, comprising all faculty members new to the Dayton Public School District will be involved in the in-service programs. Additionally, teachers newly assigned to specific schools and those recommended by their administrators will be accommodated in accordance with space and financial limitations.

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APPENDIX C

ROOSEVELT HIGH SCHOOL

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Roosevelt students presently in the 9th, 10th, and 11th grades will be given the choice of Open Enrollment to attend the high school of their choice. These students will be given priority over any other Open Enrollment movements. Statistics indicate that if the school day is expanded from six one-hour periods to seven one-hour periods that there will be sufficient space in Dayton high schools to receive all Roosevelt students. This expansion will be done without affecting the present five period teaching day of teachers. Therefore, Roosevelt can close its doors as a comprehensive high school in June 1975.

APPENDIX D

DOWNTOWN MAGNET HIGH SCHOOL

and

SATELLITE MAGNET PROGRAMS

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The magnet high school will be located in the downtown area so that all qualified students will have easy access to the formal facilities as well as to various agencies and institutions which will be utilized by the students in the magnet schools.

The satellite magnet schools located at Dunbar and Roth were selected because of their site location and their racial composition. It is the hope of Dayton City Schools that interested and qualified students from throughout the entire district will enroll in the magnet courses and thus reduce isolation at Dunbar and Roth. Moreover, the Dunbar and Roth facilities are adequate since there is ample accommodation for an increase in the student body as well as appropriate accommodation at the two sites for certain specialized courses which have been identified.

The combination of the Downtown Magnet School and satellite locations at Dunbar and Roth will attract a sufficient number of students throughout the city to reflect a more representative racial composition of the City of Dayton. In order to develop an academically and vocationally enriched magnet high school for qualified students, the administration will initiate a challenging course offering program which allows students to approach their potential and to insure the best use of available educational resources.

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APPENDIX E

KISER CAREER CENTER

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Beginning in the fall of 1975, a variety of innovative vocational education programs will be implemented in the Kiser High School building. All programs will be operational by September 1976. Both new and remodeled facilities will house the programs. Programs in remodeled areas should be ready by September 1975 while those in extensively remodeled and totally new areas will be operational in September 1976.

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APPENDIX F

THE STRUCTURED ALTERNATIVE ELEMENTARY SCHOOL

The primary emphasis in this school will be on basic academic skills and subject matter, the establishment of good study habits, and improved self-image resulting from academic achievement. The school will seek to build within each child a sense of responsibility, confidence, pride in that American heritage common to all, a strong respect for law and order,

and a healthy regard and tolerance for the rights of others. The school will provide the kind of quiet and orderly environment needed by many children in order to learn.

• • •

Enrollment at SAES will be open to all students in the Dayton City Schools. The final selection process will result in an integrated student body. Selection of students will be made according to guidelines developed by the Instruction Department in cooperation with the Student Development Department. Parents who send their children to the SAES will do so entirely of their own free will and in so doing must agree to abide by the established rules and policies of the school.

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APPENDIX G

ELEMENTARY SCHOOL MAGNET PROGRAMS: Intermediate Grade Levels

1. MODERN FOREIGN LANGUAGE
6th, 7th, 8th Grades

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In addition to offering instruction in such modern foreign languages as Spanish, German, or French, or one for which the community expresses a great deal of interest, a general language course will be offered.

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In order to implement the program, transporting students to one site would be required. Carlson School has been selected. The school day can be divided into three blocks of time allowing for up to 360 students to be served. For minimal implementation of the program six (6) foreign language teachers will be required. Students will attend the foreign language magnet on days they are not scheduled for the science centers. Foreign language will be a voluntary study option.

2. BUSINESS EDUCATION SKILLS
6th, 7th, 8th Grades

• • •

Many middle-school age youngsters will benefit from typing and other business education subjects, if available to them. For these pupils manipulative skills will be further developed, other disciplines understood and appreciated, knowledge gained concerning careers in business and all of its related fields, and a variety to the school curriculum provided which will enhance the holding power of the educational processes.

Youngsters who select this magnet will be transported from their home schools to the magnet site on the days that they do not attend the science centers. It is anticipated that approximately 300 students can be accommodated by this magnet in three time blocks per day.

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3. CAREER MOTIVATION CENTER
4th and 5th Grades

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The basic structure of the program will give the students who elect to attend the Center the opportunity to explore four broad occupational groupings during the school year.

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During the school year students will have the opportunity to explore four occupational groups. They will spend 4 hours per week (2 – 2 hour sections) at the center. Each of the four teachers at the center will have two 2-hour classes daily, four days per week. Each class will enroll approximately 25 students. It is anticipated that the implementation year 1975-76 this center will serve approximately two hundred twenty students.

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Occupational Group Description

• • •

Group	Sub-Clusters
I.	Business & office
	Marketing & Distribution
	Communications & Media
II.	Animal Science & Agriculture
	Environment
III.	Foods, Housing, and Hospitality
	Health
	Recreation
IV.	Construction
	Manufacturing
	Transportation

APPENDIX H

(Other Programs)

1. EXPANSION OF SCIENCE CENTER PROGRAM

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Science programs in Dayton elementary and middle schools as in other large city schools, vary widely in sophistication. Books and other curricular materials are provided; however, facilities and equipment for science teaching and learning are

minimal in most buildings. The expertise of teachers in guiding the learning of children in science ranges from imaginative and exciting to the direction of pupils in reading science textbooks.

The Dayton Board of Education acted to improve this situation through the establishment of four Science Centers in 1973. The 3,500 youngsters attending the five day Dayton middle schools were exempted from the program. It is now proposed that these children participate in the Science Centers effective September 1975.

2. SCIENCE ENVIRONMENTAL CENTER

• • •

A sustained period of students inter-racial contact involving both a structured and non-structured situation where students can freely and naturally interact.

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An outdoor camping experience proposes to provide for the establishment of an environmental program to involve all sixth grade students on a voluntary basis. A racially balanced group of approximately 60 students and their teacher will comprise one group of campers. By using two different camp sites, it is estimated that the entire 3,200 sixth graders will have the opportunity for this experience during the fall and spring sessions.

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3. ALTERNATE SCHOOL PROGRAM for INTERMEDIATE GRADE LEVEL STUDENTS

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The Dayton Public Schools like most urban school districts today has a sizable number of sixth, seventh and eighth grade students who have either become alienated from the regular school program or who are experiencing academic

and interrelational difficulties to the point that early school leaving (dropping out) will probably be the outcome. A high percentage of those who drop out of school and into the world of the unemployed and unemployable are close to the age of sixteen. Invariably school records indicate that those leaving at this time experienced little success and varying degrees of alienation in the intermediate grades.

• • •

The program will involve 150 students representative of all kindergarten through eighth grade elementary schools and middle schools in the Dayton School District. The population will reflect the same racial composition as does the total Dayton school population and efforts will be made to balance the enrollment with regard to sex and to economic backgrounds of the participants. Prospective students will initially be identified by their home school administrator but the final decision concerning prospective enrollment will be made by a committee consisting of a school psychologist, the Director of Alternative Education Programs, and the project coordinator. Prior to enrollment an applicant, along with a parent or guardian, will be interviewed by the coordinator or his designee at which time the school's program will be explained. No student will be enrolled without parental permission. Also, all students will have the right to return to their home school at the conclusion of any semester.

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4. SPECIAL NEEDS PROGRAMS

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The following magnet programs serve the whole school community:

The Daytime Center

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Handicapped Programs

• • •

Intergovernmental – Summer Program with City of Dayton

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VEET (Vocational Exploration, Experience, and Training)

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5. ORIENTATION AND REGISTRATION CENTER

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In depth in-service for orientation and registration for all student services advisors, student action advisors and counselors will be provided, as will all information concerning all programs, courses and extra curricular offerings in the Dayton School System.

6. COMPONENT FOR MONITORING DESEGREGATION

In each component reference has been made to "reflecting the existing racial composition of the school district." The current racial composition of the Dayton school district is approximately sixty per cent white and forty per cent black.

In order to establish that these goals are being met, an advisory committee under the direction of the Superintendent of Schools, will monitor and make recommendations pertinent to the implementation of the components of the desegregation plan. The committee will establish its own monitoring procedures, but will report to the Board of Education, through the Superintendent of Schools, no less than quarterly. The initial life of the committee will be for three years. After this time, if the plan has been fully implemented, the committee will be reconstructed and will monitor less vigorously and report less frequently. It is anticipated that within four years, once the plan has been fully implemented and operational, the committee will no longer be necessary, and will be phased out.

7. ELEMENTARY ATHLETICS

To implement an integrated atmosphere for seventh and eighth grade interscholastic athletics, already present in the high school interscholastic athletics, programs will move toward city-wide seventh and eighth grade competition for the 1975-76 athletic seasons.

8. METROPOLITAN EXCHANGE PROGRAM

The Board will continue to explore voluntary metropolitan integration authorized in its January 1972 resolution. The Board recommends that every school district within a 15-mile radius of Dayton have the opportunity to exchange a number of student spaces in the Dayton District for a like number of student spaces in its district.

APPENDIX I

A METROPOLITAN EDUCATIONAL CENTER FOR THE COMMUNICATION ARTS

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It is proposed that an educational center for the communication arts be developed for public and non-public juniors and seniors from the greater Metropolitan Dayton area, inclusive of all of Montgomery County. Students, who are recommended by their respective high schools, will select the subject area in which they wish to gain in-depth experience and receive specialized instruction. Many high school students complete their secondary curriculum requirements in three or three and one-half years and it is during the eleventh and twelfth grades that opportunity is provided for variation in schedule and program.

• • •

The career-oriented phase of communication arts education will attract students from every school, every section of the

total community, and will represent all racial and ethnic groups; racial balance will be maintained. Classes offered during morning and afternoon hours, flexibly scheduled, will accommodate 600 or more young people who can benefit by concentrated study and skill development in this rapidly expanding career field.

C. PORTION OF PLAN SUBMITTED BY PLAINTIFFS IN COMPLIANCE WITH ORDER OF JANUARY 7, 1975.

(Title omitted in printing).

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Data for the current school year for the Dayton Public Schools indicate there are 47 elementary schools (Table I) with an enrollment of 28,588 pupils, 13,164 (46 per cent) of whom are blacks. There are 5 middle schools with an enrollment of 3,537 pupils, 2,431 (68.7 per cent) of whom are blacks. Eleven high schools enroll 14,820 pupils, 6,739 (45.5 per cent) of whom are blacks.

The elementary schools display a wide range of grade organization — prekindergarten through grade 2 (1); through grade 3 (1); through grade 5 (6); and through grade 8 (11); kindergarten through grade 3 (2); through grade 5 (3); and through grade 8 (19); grades 4 through 8 (2); grades 4 through 5 (1); and grades 3 through 5 (1). Middle schools house grades 6 through 8, and the high schools grades 9 through 12.

Sixteen of the elementary schools are over 90 per cent black in enrollment; 17 are over 90 per cent white. Five secondary schools are over 90 per cent black; two are over 90 per cent white.

• • •

TENTATIVE SAMPLE FORM FOR HIGH SCHOOL APPLICATION

Name .....

Address .....

Class you will enter in September 1976:

Freshman .... Sophomore .... Junior .... Senior ....

High school attendance zone in which you reside .....

If you are currently attending a high school, indicate which one .....

On this form you will be asked to indicate three choice of high schools for September 1976. Be sure to read carefully the material below so that you will understand how to make your choice.

1. Juniors and seniors will be allowed to continue in their present school, if they so choose.
2. Except for Belmont-Dunbar and Wilbur Wright-Roth, all students who elect to attend the school in their attendance zone are assured that they will receive that assignment.
3. Any student may request attendance at any of the schools in the city, but only a very limited number of students will receive assignments to schools outside the attendance zone of their residence.
4. Students currently enrolled at Stivers-Patterson will be able to continue at that school, if they so choose.
5. Students residing in the Roth-Wilbur Wright zone and the Belmont-Dunbar zone should understand that these four schools will be desegregated in September 1976. Obviously many students residing in those zones will be assigned a school on the opposite side of the city from where they reside. Entering freshman and sophomores will be randomly selected for these assignments until the required quotas are met. Some students or groups of

students might prefer to volunteer for their assignment because in that way groups of students could be assured of being assigned to school together. Every possible convenience will be afforded students electing or assigned to a distant school, e.g., on time express buses, late afternoon and evening activity buses, and whenever appropriate, home-to-school and school-to-home delivery.

D. PORTION OF PLAN TRANSMITTED BY DAYTON BOARD IN DECEMBER OF 1975.

2. *RTA Transportation should be utilized more extensively in light of the lower cost.* This would be especially true at the high school level. Whereas, the new desegregation plan will necessitate some increase in the numbers of students requiring transportation, RTA should be utilized almost exclusively to handle such increases. A corollary benefit would accrue if the Board owned the St. John buses. The District could then utilize RTA to the maximum; even to the point of creating special routes and inaugurating new service, which they cannot now implement because of laws governing competition from the contractual line (St. John). If the Board acquired St. John, it could utilize RTA to streamline the total transportation program. RTA routes are such that all areas of the city are covered with no location, except too remote areas, more than .4 miles from a route.
3. *The utilization of taxicabs for transportation should be eliminated.* Two primary reasons justify this recommendation.
   A. It is extremely expensive transportation for the minimal results.
   B. It tends to create highly emotional feelings on the part of Black students. They react angrily when observing White students arriving at the Roth and Dunbar magnets via taxicabs. • • •

E. REPORT OF THE MASTER JOHN A. FINGER.

(Title omitted in printing).

On December 29, 1975 the Honorable Carl B. Rubin, United States District Judge, appointed me (John A. Finger, Jr. of Providence, Rhode Island) Master in the above titled action, directing the supervision of the redistribution of students on a school by school basis, and the establishment of attendance zones under the guidelines to be followed whenever possible.

Previously the Court had appointed me as Consultant to the Court directing the School Board to provide assistance and information as requested by the Consultant.

No hearings have been held in carrying out the duties assigned to the Master. One meeting was held with the attorneys in the case to inform them of procedures and activities being followed. As Master, my activities have consisted of meeting with School Board personnel, primarily the Superintendent of Schools and his executive staff, the reading and analyzing of reports and proposals prepared for me by the Superintendent and his staff.

Dayton, Ohio, a city of 245,000 is located in southwestern Ohio, some 50 miles due north of Cincinnati. The city is located in the east central part of Montgomery County, population 610,000. The standard metropolitan area, of which Dayton is the center city, has a population of approximately 850,000.

The Dayton School District is not coterminus with the city of Dayton. Portions of Harrison Township, Madison Township, Mad River Township and the village of Riverside are included in the Dayton School District. Some portions of the city of Dayton are in the Harrison Township School District, the Jefferson Township School District, and the Mad River Local School District. Appendix A is a map showing the Dayton School District and the city of Dayton boundaries. The Dayton School District has a population of approximately 268,000 and a school population of 45,000, of which slightly

less than 50% are black. With the exception of the Trotwood-Madison District, which is approximately 25% black and Jefferson Township District which is 80% black, the school districts in the Dayton standard metropolitan area are predominantly white. Of the approximately 170,000 students in the Dayton standard metropolitan area, less than 30,000 are black. Twenty-two thousand (22,000) of these black students are in the Dayton School District.

The Court's Order of Appointment limited my activities as Master to those of supervising the School Department in the development of new attendance zones and to reporting the numbers of students to attend each school, but I would be remiss in my responsibilities if I did not include some comments about my views on Dayton and its metropolitan area.

I have been subjected to a perspective on the school in Dayton from a variety of sources, a perspective which views many black neighborhoods as undesirable, and a perspective which recognizes that some white parents will be reluctant to send children to schools in these neighborhoods because of concern for the child's social well-being and perhaps for his physical well-being as well. Each person has his own perceptions through which situations are interpreted. I am glad to be able to report that I have not seen disorganized schools in Dayton. From what I have seen, parents should not be apprehensive for their children's safety and effective education in any of the schools in Dayton.

Many people have expressed to me their concern that unless some corrective action is taken Dayton will become increasingly black. Whatever the causes, the fact is that Metropolitan Dayton is predominantly white, but within it is a sector that is predominantly black.

I have made some brief studies of the history of Ohio School Districts and the laws and regulations pertaining thereto. Because historically Ohio had a great many small school districts, procedures have been established for the elimination and consolidation of districts. According to a United States Office of Education Report on the Statistics of State School

Systems (OE, HEW, OE 20020-66) in 1931-32, there were 2043 school districts in Ohio. By 1951-52 there were 1429 and in 1965-66 there were 738. In 1975 there were 617.

There are a number of authorized procedures for changing school district boundaries. The State Agencies, the State Board of Education, the County Board of Education, the Dayton Board of Education, and other local boards of education in and near Montgomery County can initiate procedures authorized by statute of the Ohio General Assembly to alter school district boundaries. In a state where there are a number of cities with extensive racial isolation, some of which are in desegregation litigation, one would have expected the State Board of Education to be actively involved in studies of the feasibility of achieving the elimination of racial isolation through alteration of school district boundaries, especially when such studies and resultant recommendations are specifically authorized by the General Assembly, but I believe none have been recently undertaken. Given too, the consequences for the entire area of increased racial isolation in the Dayton School District, one would think that all citizens in the metropolitan area whose center is Dayton, would recognize their stake, and would seek to assure the healthy development of the metropolitan area, yet neither the local boards nor the County Board acts. Indeed the facts may be that the metropolitan area schools are withdrawing from cooperative activities with the Dayton School District because they fear involvement in a metropolitan plan.

The Court is required by the Order of the Sixth Circuit to desegregate the Dayton School District Schools by September 1976. There are, however, some additional steps that the Court might consider.

The Court could direct the State Board of Education to submit proposals for the redistricting of the Dayton School District and surrounding districts.

The Court could direct the school boards of all districts, which are in Montgomery County and possibly Greene County, too, to submit to the Court a redistricting plan which

would bring each district to not more than 30% black with a view to providing district desegregation plans in which no school would exceed 40% black.

There have been proposals made by Professor James Coleman of the University of Chicago to utilize a voucher plan as a means of desegregation. Metropolitan Dayton might be an area where such a plan would be workable as one of several desegregation procedures for the area. The Court could direct the State Board of Education or some other state agency to undertake the detailed development of such a plan and could require the cooperation of the area local boards of education.

RECOMMENDED DESEGREGATION PLAN FOR DAYTON

Introduction

A desegregation plan must first comply with the mandates of the Court which establishes the guidelines for what is to be done, but one cannot be unmindful of the magnitude of the problems which can be encountered in implementing a desegregation plan.

For a plan to work effectively means that children will receive good educational experiences, and that the schools and the city will thrive and prosper. What actually will happen in Dayton depends upon the citizens in Dayton, and what they do both individually and collectively. Desegregated schools can be healthy learning environments where children and students share their common bonds as people and citizens of Dayton. To make desegregation not the end of the world, but the beginning, requires patience and tolerance and cooperation. Children will not be harmed because they are in desegregated schools, but each child and each student needs the assurance of parents and of the community that the program can function effectively. Even with the most efficient

planning there are bound to be problems. Each person needs to exercise restraint so that problems and confrontations can be resolved, rather than be magnified and intensified.

Desegregation plans differ in the way in which students are assigned to schools. While in some cities, desegregation requires only the alteration of attendance zones, this technique is neither feasible nor fair when the black and white communities are isolated from each other. For most of the elementary schools and for some of the high schools, there does not seem to be an alternative, except to pair schools.

Once the decision to use pairing has been made, several alternatives are available as to the method of assigning students to schools. A frequently used method is the grade assignment plan. In this procedure two paired schools, one in a white residential area and one in a black or minority residential area, serve different grade level students. One school might enroll only students in grades 1 through 3, and the other school in the pair enroll only students in grades 4 through 6. A slight alteration of grade assignment pairings would be to develop a new grade level organization such as 1-5, 6-8, 9-12 or 1-4, 5-8, 9-12, and select the schools to serve grades 5-8 so that all are located in one or the other of the black and white communities. To avoid having the younger children of one or the other communities being always the group bused away from their residential area, a city might be zoned into three or four large districts with the elementary schools (grades 1-4) being on one side of the city in one district and on the other side in another district. Where there are geographic barriers defining such districts such a procedure is most workable, for otherwise citizens residing in close proximity to each other would experience differing treatment. Some might have their elementary school children bused away from their residential area for four years, while others would have their middle school children (grades 5-8) attending school away from their residential area.

There seems to be widespread agreement among the administrative staff of the Dayton Board of Education that the

grade structure should be uniform with every elementary school serving grades K-8, and high schools enrolling grades 9-12. While some citizens might disagree with that decision, preferring to continue with the middle school organization, I have felt it inappropriate to not allow such decisions to be made by those responsible for the educational programs.

One provision of the Court Order indicated that children were not to ride school buses for more than twenty minutes, nor to be bused a distance greater than two miles, if it was possible to achieve this and still comply with the requirement of desegregation of the schools.

These suggested Court Guidelines cannot be met. Wherever feasible, schools have been desegregated by restructuring attendance zones so as to comply with the suggested Guidelines and so as to reduce transportation. Some paired schools are in close proximity to each other and the distances and travel times are within the suggested Guideline. Some paired schools are more than five miles apart. However, distance probably is not as important a criterion as time of travel. Despite the large distances separating some school pairs, the longest travel time should not much exceed twenty minutes. The School Board through its administrative staff should make every effort to minimize travel time and to provide maximum comfort and convenience for students.

Elementary School Pairing Plan

The plan for Dayton utilizes a unique method of pairing elementary schools. While some elementary schools in Dayton are to be desegregated by redefining attendance areas, others will be paired. In the paired schools each child will spend one-half of each year in the school near home, and the other half of the year in the other school. Thus, every child will be a member of two schools. The child will not change classmates nor teachers, but will at the middle of the year change buildings.

The advantages to this method of pairing are:

1. The child remains with the same teacher and classmates throughout the year.
2. Every child, teacher, and parent is involved in bringing unity to the two schools.
3. The procedure is fair to each person and each group without requiring an extensive system of keeping track of which child has been assigned a school away from home a previous year.
4. Parents of paired schools can work together to assure the maintenance of quality education, with all sharing concern for both schools. Some might construe as a disadvantage to this method of pairing the fact that teachers must change buildings at midsemester. Undoubtedly, this will be an inconvenience to teachers, but this inconvenience should be outweighed by the advantages of bringing the two paired schools together as a single unit.

The pairings will operate in this way:

1. During the summer or prior to the close of school this year, teachers and principals in the paired schools will decide which teachers will be assigned to the two schools in a pair. They will select the students who will make up each class.
2. When schools open in September, students will report to the school in their attendance zone. There will probably be a few days during which children stay in that school while the children are being selected for the desegregated classes.
3. One-half of the children in every paired school will be assigned to the paired school not in their attendance zone. When the program starts, the children will leave that school and go to the other school in the pair.
4. When they arrive they will meet the other half of their

classmates and their teacher whom they will be with for the year.

5. Bus routes will be established so that travel time between schools will be as short as possible. In some attendance zones all children will walk to their school and the buses run from school to school, but where it will be more convenient, pick up points will be established so that children will not have to first walk to school.
6. At midyear, the schools will close for a few days while teachers and some supporting staff move from one paired school to the other. When schools reopen, those students who had been attending the school in their attendance zone will go to the other paired school and vice versa. Their teacher and their classmates will be in that school.

Pairing Involving More Than Two Schools.

In some instances two schools are paired with one school. This arrangement does not alter the experiences of individual children or classes, for the children involved remain members of two schools. Where one school is paired with two schools, the administrative staff (principals and teachers) in devising the classes should select children so that for the most part, the children residing in the same geographic area are assigned to the same one of the paired schools. This does not require precisely defined zones. It rather is an informal arrangement so that neighbors in a geographic area have all of their children in the same two schools.

With but one exception in the paired schools, each school of the pair is almost exclusively one race or the other. Where there are but a few children of the opposite race in the predominantly one-race schools, those children are to be included in the pairing arrangement. The one exception is the Van Cleve district. The Van Cleve School is to be a dual function

school. One part of the school will be an integrated school that does not participate in the pairing. This part of the school will enroll approximately 350 students, half white, half black. The other part will participate in the pairing with Residence Park. The School Board may either rotate the white students on a yearly basis who are assigned to the integrated part or define a sub-attendance zone in the Van Cleve district, in which an integrated population resides and assign those students to the part of the Van Cleve School which does not participate in the pairing. If there are other similar situations, or if others develop, the above procedure should be followed.

SCHOOL ASSIGNMENTS

Northern Region

1. Many of the attendance zones in the northern region have been redefined. A Cornell Heights zone includes part of Fairport, Fairview, Jefferson, and Gardendale. Some of Jefferson is not in the northern district. Some of Jefferson is zoned to Fairview. Some of Hickorydale and Gettysburg is zoned to Belle Haven. The attached map defines the new attendance zones.

2. **Paired Schools:**

   Cornell Heights – Meadowdale
   Brown – Jefferson
   Shiloh – Fairport
   Loos – Fairport
   Gardendale – Valerie

3. **Schools desegregated by zone changes:**

   Belle Haven
   Fairview
   Hickorydale
   Gettysburg

Central Region

1. An extended zone including parts of Jefferson and Van Cleve has been defined for McGuffey, Webster, and Allen. A MacFarlane zone has been defined encompassing parts of Weaver and Edison. Weaver is to be closed. The attached map defines the new attendance zones.

2. **Paired Schools:**

   Huffman – Jackson
   Franklin – Edison
   Lincoln – MacFarlane
   Washington – MacFarlane
   Residence Park – Van Cleve
   Residence Park – Kemp
   Orville Wright – Westwood-McNary
   Ruskin – Westwood-McNary

3. **Schools Desegregated by Zone Changes:**

   Allen, Webster, McGuffy.

   An area formerly in the Jefferson zone is included with Allen, Webster and McGuffey. The School Department will assign these students so that each of the schools will enroll approximately the same proportion of black students. Some black students now attending McGuffey will be reassigned to Webster or Allen.

Southern Region

1. Irving area is rezoned. The Irving School is closed and the students assigned to the Whittier School.

2. **Paired Schools:**

   Grant – Carlson
   Drevel – Jane Addams
   Troy – Belmont
   Troy – Horace Mann
   Troy – Eastmont

Emerson – Whittier
Patterson – Whittier
Lewton – Highview
Cleveland – Wogaman

PROJECTED ENROLLMENTS

Northern Region

	Number of Students	% Black
Cornell Heights – Meadowdale	1250	53%
Brown – Jefferson	1750	51%
Shiloh – Fairport	700	45%
Loos – Fairport	800	45%
Gardendale – Valerie	625	54%
Belle Haven	825	42%
Fairview	750	45%
Hickorydale	325	51%
Gettysburg	425	55%

Central Region

	Number of Students	% Black
Huffman – Jackson	1025	50%
Franklin – Edison	1100	43%
Lincoln – MacFarlane	1300	49%
Washington – MacFarlane	625	49%
Residence Park – Van Cleve	1100	47%
Residence Park – Kemp	900	47%
Orville Wright – Westwood	900	47%
Ruskin – Westwood-McNary	1100	51%
Allen	900	44%
Webster	850	44%
McGuffey	425	44%

Southern Region

Grant – Carlson	800	48%
Drexel – Jane Addams	850	45%
Troy – Belmont	800	44%

Troy – Horace Mann	325	44%
Troy – Eastmont	775	44%
Emerson – Whittier	725	50%
Patterson – Whittier	725	50%
Lewton – Highview	575	49%
Wogaman – Cleveland	1675	47%

Note: Some of the facilities at Miami Chapel or another nearby school may be utilized in addition to the Troy Elementary School

Special Programs and Schools

Handicapped and Special Education Programs

Programs for handicapped students and special education programs as well as the Occupational Work Adjustment and Alternate Middle School programs will remain in their present locations or be relocated at the discretion of the Board of Education. Students assigned to these programs need not be involved in pairing. Kindergarten students will attend the school in their attendance zone or will be assigned to other nearby schools at the discretion of the Board of Education.

Magnet Schools

Miami Chapel will continue as an open enrollment magnet school with a specialized structured curriculum.

Longfellow will be an elementary school serving grades 1-8 or other grades if the Board of Education deems that appropriate. Longfellow will have a special Individual Guided Educational Program.

Any elementary level student is eligible to attend either of these schools. The Board of Education should try to accommodate requests for enrollment in these schools. However, the Board is not required to run an extensive transportation network to honor all requests, nor is the Board to allow the basic pairing structure of the desegregation plan to be come imbalanced because of enrollment in these schools. The target

population for school enrollments should be 50% black and 50% white, but the Board may allow additional enrollment within the Court Guidelines. Additional open enrollment magnet schools may be operated if applications so warrant, but these are subject to the above strictures.

Magnet Programs for Grades 6, 7 and 8

In the current school year a number of middle schools are in operation. Students not attending middle schools are presently allowed to elect the magnet programs so that they have a considerable amount of choice available to them which provides a diversity of programs.

The onset of desegregation during the 1976-77 school year creates some difficulties with these magnet programs because the students being bused between paired schools would be bused again to attend magnet programs. Arranging transportation so that students would attend a magnet program on the way to or on the way home from a paired school could partially but not completely alleviate this problem. With the upper elementary grades, grades 6, 7 and 8 being assigned to elementary schools, rather than larger unit middle schools or junior high schools as is the usual practice elsewhere, some special provisions need to be made for this group of students.

The school administrative staff has not yet completed its plans for the location and operation of its magnet programs. These programs will continue and be so located as to minimize transportation and provide convenient program availability for all students.

RECOMMENDED DESEGREGATION PLAN FOR HIGH SCHOOLS

The Dayton administrative staff acting under my direction has submitted some suggestions to me for the high schools. Especially endorsed and commended are their proposals to continue the Alternate Learning Center, the Downtown Magnet High School, the Job Training Center, the Kiser Career Programs, and the Citywide Cooperative Programs at Stivers-Patterson. The proposal to create a Metropolitan Education Center for the Communication Arts (MECCA) is an excellent one. I have reviewed that proposal in considerable detail and believe it is truly an innovative and valuable project. Funding for this project is only partially assured. Since this would be a school to serve Metropolitan Dayton, I recommend that the Court direct the County Boards of Education of Montgomery and Greene Counties, the State Board of Education and the Dayton Board of Education to jointly prepare a proposal for the funding and implementation of MECCA.

The Dayton Board of Education has initiated programs in Computer Technology at Dunbar High School and Communication and Mass Media at Roth High School. These programs have not attracted many students, in part because they have been phased in during the current school year. In the long run the desegregation of Roth, Dunbar, Belmont, and Wilbur Wright high schools will depend upon these schools providing meaningful and effective programs for all students and upon specialized programs being offered in these schools which will attract diverse populations to them.

The Dayton Board of Education should prepare and submit a plan for locating more unique and specialized programs in these four high schools so that students can make meaningful selections among these schools.

While it may not be possible to effectuate much program change by September 1976, the Board should develop long-term and short-term program strategies for these schools.

The recommended plan for desegregating the high schools in Dayton primarily utilizes attendance zones, but a rather involved procedure must be established because there are exceptions to the general rule that students will attend the high school in their attendance zone.

The exceptions are:

a. Students who will be juniors or seniors in September 1976 may continue in their present high school.
b. Students may apply to the non-zoned schools, which are Stivers-Patterson, and Kiser (grades 11 and 12).
c. Some students in the Dunbar Zone are to be assigned to Belmont, some in Belmont assigned to Dunbar, some in Wilbur Wright assigned to Roth and some in Roth assigned to Wilbur Wright.
d. Some transfers to high schools outside a student's attendance zone may be permitted when the transfer aids desegregation.

There have been extensive discussions with the school administrative staff as to the procedure to be followed in assigning students to Dunbar-Belmont and Wilbur Wright-Roth. One proposal was to sub-divide each of the attendance zones of Belmont, Roth, Dunbar and Wilbur Wright high schools into two parts, an A Zone and a B Zone, and in alternate years to assign students on a rotating basis from these sub-zones to one or the other of the paired high schools. Even though it fulfills the Order of the Court this sub-zoning procedure of the administrative proposal has some shortcomings, the most serious of which is that it reassigns more students than is necessary.

My recommendation is for a procedure that would have all students be given choices of high schools. These choices would be accommodated, where possible. When the choice could no longer be accommodated, students would be selected randomly for their assignment. This selection procedure would be repeated each year, but students entering their senior year in a high school would have the right to continue in the school they attended the previous year. This procedure seems to me to be fairer to individual students, and to gradually allow specialized programs to be developed, which would attract

an integrated student body to the currently segregated high schools.

Obviously in the coming year many students in the Belmont-Dunbar zone and in the Roth-Wilbur Wright zone will be required to attend the more distant school, for it seems unlikely that sufficient students will choose schools in the proportions that meet the Court Guidelines. There could be considerable voluntary choice for the more distant school since students or groups of students might prefer to volunteer, and thereby be assured that present groups of friends are not broken up by a random selection process.

The number of students to be reassigned would be as follows:

	Entering 9th Grade	Entering 10th Grade
From Belmont to Dunbar	225	225
From Dunbar to Belmont	150	150
From Wilbur Wright to Roth	200	150
From Roth to Wilbur Wright	125	125

The procedure for establishing high school attendance is further clarified in the following pages, which consist of a preliminary sample form which would be completed by all students, who will be in high school in September 1976. The sample form is tentative for it needs careful examination by the school administrative staff to assure that all contingencies have been included. The School Board, not the Court, would provide the assurances of transportation efficiency and convenience indicated on the sample form.

The procedure of random selection of students does not exclude the possibility of assignment by geographic areas. After students have made their choices of high schools and the assignments have been made based on these choices, the School Board administrative staff could determine the number of students which must be reassigned between Dunbar-Belmont and Wilbur Wright-Roth. They could then define an area, several areas, or a number of small areas containing

the proper number of students and the students residing in these areas would be reassigned.

If you reside in the Roth, Wilbur Wright, Belmont or Dunbar zone and you *volunteer* for an assignment to the more distant school, you will be making a commitment for only one year. At the end of the year you may request a different assignment. In that case your name would be placed in the random assignment pool. If your name is drawn, you would continue at the more distant school. Those who for September 1976 are randomly selected for assignment at the more distant school will have that as a permanent high school assignment.

Please complete the remainder of this form.

If you are currently enrolled in a high school, do you wish to continue in that school? Yes ..... No .....

Irrespective of how you responded above, please indicate your choices of high schools below.

My first choice is .....
My second choice is .....
My third choice is .....

PROJECTED ENROLLMENTS FOR HIGH SCHOOLS
SEPTEMBER 1976

	Total Enrollment	% Black
Belmont	2100	23%
Dunbar	1400	68%
Fairview	1000	54%
Kiser	900	35%
Meadowdale	1900	47%
Roth	1250	78%
Stivers-Patterson	2800	55%
Colonel White	1300	65%
Wilbur Wright	1550	32%

Note: The Freshman and Sophomore classes at Belmont, Dunbar, Roth and Wilbur Wright will have the following estimated enrollments:

	Total Enrollment	% Black
Belmont	1150	34%
Dunbar	800	44%
Roth	575	47%
Wilbur Wright	900	40%

ADDITIONAL CONSIDERATIONS AND RECOMMENDATIONS

Transportation

An efficient transportation system is very important to assure the effectiveness of desegregation. Long, crowded bus rides, late buses, or lack of buses for after-school activities, create discontent which may be directed at the Court or desegregation rather than at an inefficient transportation network. Students are entitled to as much convenience as can possibly be afforded them. Students should not be penalized by inability to attend after-school activities because of new school assignments.

The School Board should complete a preliminary transportation plan as soon as feasible reporting their overall plan to the Court in sufficient detail to show whether sufficient buses are available to provide the needed transportation.

Safety of Students

The School Board should work with law enforcement agencies to prepare contingency plans to assure the safety of all students. The School Board should informally describe to the Court their progress in developing contingency plans assuring themselves and the Court that law enforcement officers are adequately briefed and trained.

Training of Teachers

The School Board is to make certain that all teachers are adequately prepared to deal with the new situations which will be encountered. If there are special problems in training teachers for the desegregation program which warrant the Court's consideration, it should be informed of the needs and problems and of the possible ways in which resolutions can be effectuated.

Continuation of Services to Students

Federal funding regulations under Title I sometimes result in individual students losing eligibility for special services. The School Board should make every effort to see that students are in no way deprived of services as a result of their reassignments. The Court should be informed if there is an inability to provide needed services, indicating what steps needs to be taken.

Funding for Desegregation

Throughout the nation, urban centers tend to have higher tax rates than surrounding areas. The problem of providing adequate funding for all services, including education, becomes exacerbated when the tax base of cities erodes. Dayton is no exception to what seems to be the general rule of higher city taxes. Intervention in this problem is difficult, but the Court needs to be continually apprised of the funding situation. The Board of Education has made applications for federal funds and seems assured that sizable funds will be available. However, like other governmental agencies, the Dayton Board of Education has a limitation on the availability of contingency funds of the kind necessary to support the specialized services which are needed in carrying out school desegregation. A successful educational program in Dayton is essential to assure citizen satisfaction. The Court may wish to request regular reporting by the School Board on its financial condition.

VI. RELEVANT PLEADINGS

A. PLAINTIFFS' REQUEST FOR ADMISSIONS

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Plaintiffs, pursuant to the Federal Rules of Civil Procedure, request each defendant to admit the following facts. In addition, plaintiffs request that the following facts be stipulated to by defendants prior to the pre-trial conference scheduled for October 23, 1972.

1. In 1918 defendant Dayton Board assigned 4 black teachers to a frame two-story house which was converted to a school building for black students and which was located immediately behind the Garfield school, a brick building. All white children and all white teachers were assigned to the brick building; only black teachers and black students were assigned to the frame structure.

2. The following additional facts pertain to the Garfield school, referred to in Request No. 1:

(a) In 1922 a lawsuit alleging unlawful segregation was initiated by a parent of one of the black students assigned to the frame structure behind the Garfield school. This lawsuit, entitled *Reese* v. *The Board of Education of the School District of the City of Dayton*, No. 670 (Ohio App., 2d Dist., Montgomery Co.), resulted in a decision by the Court of Appeals on July 3, 1925, declaring the alleged segregation practice at the Garfield school unlawful. This decision was affirmed by the Supreme Court of Ohio, February 16, 1926. 114 O.S. 188

(b) After 1926, the Dayton Board continued to maintain separate classes for black students with black teachers in the frame building behind the Garfield school although the Reese children (involved in the lawsuit (paragraph (a), *supra*) and a few other black children were allowed to attend integrated classes after the Ohio Supreme Court's decision.

(c) At least 90% of the black children remained in the frame building until about 1932, when the classes in the frame building were moved to the brick building. At that time (in the brick building) black teachers continued to teach all black classes.

(d) White students who lived in the Garfield attendance area were allowed to transfer to other schools during the 1930's. In 1936 Garfield became all black in student enrollment and, at about the same time, an all black faculty was assigned to the school.

(e) After 1936, the Garfield school remained 100% black until it was closed in 1961.

(f) In 1962 the Garfield attendance area was absorbed by the newly-created McFarlane attendance zone.

3. The McFarlane elementary school (the former Dunbar High School) opened in 1962 under a newly-created zone with a virtually all-black student enrollment and staff. The McFarlane student enrollment in 1971-72 was 99.6% black.

4. The following facts pertain to the Wogamon elementary school:

(a) During 1943 and 1944 white students in the Wogamon zone were allowed to transfer out to other schools.

(b) In 1945 Wogamon became all black, with an all black staff and a black principal.

(c) The Wogamon student body remains 100% black and the staff remains majority black.

5. In 1919 the Dayton Board proposed to place black children in the basement of the Willard school with two black teachers. This proposal was not effectuated because of parent protest and the refusal of a black teacher to teach in the basement.

6. Between 1919 and 1935 white students in the Willard

zone were allowed to transfer to other schools and Willard became 100% black about 1935, at which time an all black staff and a black principal were assigned to the school. Willard remained all black until it was closed in 1962 and its zone absorbed by the McFarlane school.

7. The following facts pertain to the Dunbar High School:

(a) Dunbar opened in 1933 with an all black student enrollment, all black staff and a black principal.

(b) Unlike all other high schools in the Dayton system, Dunbar had no attendance zone and attendance was voluntary.

(c) Black students attended Dunbar from all over the City of Dayton, many passing white high schools such as Stivers and Fairview in order to attend Dunbar.

(d) About 1949 black students were bused from Shawn Acres Children's Home a distance of 8-10 miles to Dunbar. This practice was discontinued as a result of protests by the NAACP.

(e) White students living in the immediate vicinity of Dunbar were allowed to attend other high schools such as Roosevelt, whose zone overlapped the Dunbar area.

(f) Dunbar was not allowed to participate in intercity athletics until the mid-1940's; Dunbar athletic teams played all black high schools from other cities in other states.

(g) In 1959 defendant French, as Superintendent of Dayton Schools, stated, "For all intents this school (Dunbar) has been a Negro school."

(h) In 1962 a new Dunbar High School was built in an all black residential area, and the old Dunbar school became McFarlane elementary school.

(i) The new Dunbar was given a geographic attendance zone and opened all black (students and staff). Dunbar remains 100% black.

7A. The following facts pertain to Roosevelt and Roth High Schools:

(a) Until about 1950 separate facilities, including separate swimming pools and separate locker room facilities, were maintained at Roosevelt for black and white students.

(b) Roth High School opened in 1959, acquiring part of the Roosevelt attendance area, with a capacity for approximately 1900 students but with an enrollment of only 662.

(c) The newly-created Roth zone included most of the white residental areas in the pre-1959 Roosevelt zone.

(d) Roosevelt's enrollment decreased by 644 students the year Roth opened.

(e) The year Roth opened (1959) the black enrollment at Roosevelt increased from approximately 60% to approximately 80%.

8. During the 1970-71 school year, 571 or 66% of the 873 black teachers in the Dayton system were assigned to the 20 over 90% black schools.

9. Not until 1951 did the Board of Education adopt a policy of assigning any black citizen to teach in white or mixed classrooms.

10. In 1954 of 162 non-traveling black teachers, 148 (91.4%) were assigned to five schools with all black pupil populations. Thereafter, the Board's policy continued, "to introduce Negro teachers gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept Negro teachers."

11. About 1951 the Board announced a policy, again for the first time, of introducing white teachers in schools having Negro population; on November 30, 1954, only 8 full or part-time white teachers, or 0.6% of the 1409 white teachers were in these situations. Defendant French at that time as Superintendent attributed such lack of success to the reluctance of white teachers to teach in the black schools; moreover, it was then the District's policy and so remained until the late 1960's, not to assign or reassign white teachers to black schools against their will. Even into the late 1960's white teachers often were not hired or refused employment or were assigned to predominately white schools in the District because of the availability of teacher openings in the suburban, all white schools, the personal beliefs and behavior of white applicants, and the policies and practices of the District.

12. Prior to 1968, the District employed 10 black assistant principals.

13. Prior to 1968, all 10 assistant principals were assigned to schools with 90% or more black pupils.

14. In 1970 there were 14 Negro principals.

15. In 1970 all Negro principals were assigned to schools with over 90% Negro pupil populations.

16. As of 1970 the District employed 496 Negro elementary school teachers. 435 or 87% of these teachers were assigned on a full-time basis to schools where the student body was more than 70% Negro.

The District employed 181 Negro high school teachers as of 1970; 86% were assigned on a full-time basis to schools where the student body was more than 92% Negro.

17. Of the 26 black counselors employed by the system as of 1970, 25 or 96.1% were assigned to schools where the student body was more than 92% black. There was but one Negro head coach in the system at Dunbar, 99.3% Negro. There was a Negro assistant coach at the Roth School which is 92.3% Negro; and the only other assistant coaches were at the Dunbar School.

18. Of the 1662 white teachers employed in 1970, only 234 or 14% were assigned on a full-time basis to schools serving pupil populations in which their race was in a minority.

19. Non-certified personnel and clerical staff were assigned in a similarly racial pattern.

20. During the 1967-68 school year substantial numbers of white faculty transferred from predominately black schools and were replaced primarily by black faculty.

21. After an H.E.W. compliance review, H.E.W. finding of non-compliance with Title VI, and agreement by Defendant Board entered into with H.E.W., teachers were reassigned to accomplish substantial faculty desegregation; but the racial pattern in the allocation of other staff, including non-certified personnel and clerical staff, persists.

22. In 1971-72 of 34,427 pupils in elementary schools, only 2,573 (7.5% of the total) attended schools which were less than 80% black or white, while 28,256 (82% of the total) attended schools which were more than 90% black or white.

23. Of the 14,929 black students in elementary schools, 12,520 were contained in 18 90% or more black schools with but 282 white students; and of the 19,495 white pupils in elementary schools, 15070 were contained in 23 schools more than 90% white with but 381 black pupils.

24. Of 52 elementary schools, 40 served pupil enrollments more than 90% black or 90% white; and while *only* 3 elementary schools even roughly approximated the system-wide racial mix, 25 contained pupil populations more than 99% black or 99% white.

25. This statistical pattern of similarly substantial duality in pupil assignments exists in the middle and high schools and has existed for as many years as there are records of the Dayton Public Schools.

26. In the Dayton area, black citizens have been contained in separate and distinct residential locations and their residential choices have been restricted on a racial basis by public and private discrimination.

This residential segregation is pervasive and long standing, the direct result of discriminatory action and inaction at all levels of government.

27. Despite defendant school authorities' continued awareness of the residential segregation, they constructed schools and imposed various student assignment policies and practices which incorporated this residential segregation and resulted in the substantial duality in pupil assignments described supra.

27A. Defendant school authorities, in cooperation with the Dayton Metropolitan Housing Authority, constructed and otherwise provided schools to serve pupil populations from public housing and war housing projects, which were segregated on a racial basis by official action; as a result of the operation of various school assignment policies or practices, the student body and staff of these schools were predominantly of the same race as the public housing and war housing projects.

28. Defendant school authorities, in cooperation with various segments of real estate industry, constructed or otherwise provided schools for the pupil populations from new subdivisions or developments which were racially exclusionary; as a result of various school assignment policies or practices, the student bodies and staff of these schools were predominently of the same race as the subdivision or developments.

29. From 1951 through the present school year, at a cost of 31.13 million dollars, 612 regular classrooms were constructed which opened with all or predominantly white pupil populations and predominantly white faculties and continue to serve all or predominantly white pupil populations. From 1966 to present, 145 similarly identifiable white classrooms were constructed at a cost of 10.1 million dollars. From 1951 through the present school year, at a cost of at least 9.72 million dollars, at least 242 regular classrooms were constructed which opened with all or predominantly black pupil

populations and predominantly black faculties, and continue to contain all or predominantly black pupil populations. From 1966 to present, 46 similarly identifiable black classrooms were constructed at a cost of 3.13 million dollars.

30. On a system-wide basis some predominantly black schools, like some predominantly white schools, have operated substantially under capacity. Over 7,000 pupil spaces have existed in such undercapacity black schools in the 1971-72 school year.

30A. At various times some predominantly black schools, like some predominantly white schools, have been substantially overcrowded. To accomodate such overcrowding new classroom space has been added to the overcrowded school rather than reassign the pupils to school predominantly of the opposite race. In the major instance where pupils (black) have been reassigned to opposite race schools (white) because of lack of sufficient space (caused by a fire) in a one-race school (black), the black children were reassigned to a virtually all black school for the 1971-72 school year; this reassignment resulted in the resegregation of the white schools to the extent black children were transferred out, as well as the creation of another virtually all black school.

31. With one exception, the few white children transferring to black schools under freedom of enrollment,

(a) no predominantly white residential area has been assigned or reassigned to a predominantly black school and

(b) no white child has been transported to a predominantly black school.

31A. Black pupils have been assigned, transported, otherwise transferred out of predominantly white schools, sometimes past or away from other predominantly white schools, to black schools.

31B. White pupils have been assigned, transported, otherwise transferred out of predominantly black schools, sometimes past or away from other black schools, to predominantly white schools.

32. Optional attendance areas were established, and are still maintained in at least eight instances, between pairs of schools which are substantially disproportionate in their pupil racial composition.

The effect of such optional zones has been,

(a) to allow whites to avoid attending blacker schools,

(b) to assign white pupils to the whiter schools,

(c) to assign black pupils to the blacker schools.

32A. Optional zones have been created and maintained in response to community sentiment.

32B. In 1971-72, 39 white students advantaged themselves of freedom of enrollment transfers: 9 transferred to black schools, while 30 transferred to white schools. In the 1971-72 school year 460 blacks advantaged themselves of freedom of enrollment transfers: 456 transferred to black schools. In previous years, any integration accomplished by operation of the policy, first established in 1969, was similarly one-way and in part segregatory: of the whites transported most transferred into whiter schools.

33. The average yearly operating cost of maintaining a pupil space in the Dayton Public Schools is $140.

33A. The average yearly cost of transporting a pupil in a coordinated, urban transportation system, like Dayton, approximates $50/year; in Dayton yearly transportation costs on buses owned by the District average roughly $50 per pupil.

34. Defendant school authorities have considered, adopted, and implemented a middle school policy for some schools in the system.

34A. This policy now effects approximately 20 schools by

reorganizing their structure from K-8 to K-5, 6-8. This provided the opportunity to reorganize both the feeder patterns and attendance areas for the twenty schools chosen.

34B. Defendant school authorities were made aware, by recommendations from a Title IV center consultant, that such reorganization provided an opportunity to accomplish desegregation.

34C. The board chose to implement the middle school policy so that pupil segregation was and is maintained in the schools effected.

35. Defendant school authorities have been made aware by recommendations and proposals from private citizen's groups, the defendant Ohio State Department of Education, and the policies adopted on December 8 by the prior board, of many opportunities to desegregate substantially the Dayton Public Schools but have chosen instead to build schools and impose various pupil assignment policies and practices in a fashion which resulted in the existing racial separation.

36. In 1965 the District reported that only one school was "so evenly distributed in its student body that it (could) be regarded as having neither a predominantly Negro or white student body."

37. Defendant school authorities are responsible for the assignment of teachers and pupils in the Dayton Public Schools.

38. In the 1957-58 school year only 4 Negro students were enrolled in Patterson Co-Operative High School, a vocational school with no attendance area.

39. White children in the Roth, Roosevelt, and Dunbar attendance areas attended Patterson Co-Op in substantial numbers, while the number of black students enrolled there, at least through 1963-64 school year, was no more than 18.

40. At least through the 1963-64 school year, black children were systematically excluded from the Patterson High

School and the effective exclusion of black pupils persisted for some time thereafter.

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B. PLAINTIFFS' FIRST ERRATUM ON REQUEST FOR ADMISSIONS

Please be advised that Request for Admission Number 32B, due to clerical error, is erroneous insofar as it reads ". . . . 456 transferred to black schools." Plaintiffs request that each defendant substitute ". . . . 456 transferred to white schools" in Request number 32B and admit same.

C. PLAINTIFFS' SECOND ERRATUM ON REQUEST FOR ADMISSIONS

Please be advised that Requests for Admissions 8, 12, 13, 14, 15, 16, 17 and 18, which deal with the assignment of faculty, principals and coaches, are in error due to clerical mistakes and discrepancies in the data provided. Plaintiffs request that each defendant substitute the following and admit same:

8. During the 1970-71 school year approximately 561, or 70% of the 806 black teachers in the Dayton school district were assigned to the 20 schools with over 90% black pupil populations.

12. In the 1968-69 school year the District employed 14 black assistant principals.

13. In the 1968-69 school year 9 of these 14 assistant principals were assigned to schools with 90% or more black pupil populations, while 3 were assigned to schools with pupil populations more than 90% white.

14. In the 1968-69 school year there were 13 Negro principals in the Dayton public schools.

15. In the 1968-69 school year 12 of these Negro principals were assigned to schools with over 90% black pupil populations,

while the other was assigned to a school with a 57.1% Negro pupil population.

16. In the 1968-69 school year the District employed approximately 534 black elementary teachers; about 433 or 81% were assigned on a full-time basis to schools where the student body was more than 90% Negro.

17. In the 1968-69 school year of the 25 black counselors employed by the system, 25 or 100% were assigned to schools where the student body was predominantly black. In the 1967-68 school year of 19 black high school coaches only one was assigned to a school with a pupil population less than 87.5% black.

18. Of the approximately 1847 full-time white teachers employed in the 1968-69 school year, only about 142 or 8% were assigned to schools serving pupil populations 90% or more black.

D. ANSWERS OF DEFENDANT DAYTON BOARD TO REQUEST FOR ADMISSIONS

Defendants Dayton Board of Education, Josephine Groff, James D. Hart and William E. Goodwin, by their attorneys, answer the plaintiffs' request for admissions as follows:

1. Admit that in 1918 the Dayton Board assigned four (4) black teachers to a frame two-story house which was converted to a school building; admit that this building was attended by blacks; admit that this building was located behind the brick Garfield school building; admit that only black teachers were assigned to the frame structure; admit that all white teachers taught in the brick building; say that they are without information as to the remaining requests for admissions and that the information known or readily obtainable is insufficient to enable them to admit or deny such requests.

2. (a) Deny requested admission but admit that on April 30, 1925 a mandamus action was filed by Earl Reese in

the Court of Appeals for Montgomery County. This action was entitled *State of Ohio, ex rel. Earl Reese* v. *The Dayton Board of Education*, Case No. 670. Said defendants admit that in a decision entered of record on December 24, 1925, the Court of Appeals in ordering a writ of mandamus commanding the defendant to admit children of colored race upon equal terms with white children in the Garfield school district, found that "separate classes were maintained for colored pupils and that those classes met in a different building from the building in which classes of white pupils met." Said defendants say that the defendant in said action filed a demurrer and that the appellate decision overruling the demurrer was appealed to the Supreme Court of Ohio. The Supreme Court, in *Board of Education of School District of Dayton* v. *State*, 114 Ohio St. 188 (1926) affirmed the appellate decision overruling the demurrer.

(b) Admits that after 1926 black children attended integrated classes at Garfield; admit that black teachers taught in frame building behind the brick school; say that they are without information as to the remaining requests for admissions and that the information known or readily obtainable is insufficient to enable them to admit or deny such requests.

(c) Say that they are without information as to this request for admission and that the information known or readily obtainable is insufficient to enable them to admit or deny such requests.

(d) Admit that white students as well as all other students, regardless of race, who lived in the Garfield attendance area, were for good cause allowed to transfer to other schools during the 1930's; admit that Garfield became predominantly black in student enrollment and that about 1936 an all black faculty was assigned to the Garfield school, say that they are without information as to the remaining requests for admissions and that the information known or readily obtainable is insufficient to enable them to admit or deny such requests.

(e) Admit that Garfield remained predominantly black after 1936; admit that during the period of 1947-52 Garfield was all black; say that they are without information as to the remaining requests for admissions and that the information known or readily obtainable is insufficient to enable them to admit or deny such requests.

(f) Admit.

3. Admit with modification that student enrollment in McFarlane in 1971-72 was 99.5% black.

(4) (a) Admit with the modification that white students, as well as other students, regardless of race, were allowed to transfer from the Wogaman zone for good cause.

(b) Admit that in 1945 Wogaman had an all black staff and a black principal. Deny that Wogaman was all black but admit that it was predominantly black.

(c) Deny that the student body at Wogaman remained 100% black from 1945 to the present; admit that in October, 1972 the Wogaman student body was 100% black; deny that majority of the Wogaman staff remained black during the period of 1945 to October of 1972.

5. Say that they are without information as to this request for admission and that the information known or readily obtainable is insufficient to enable them to admit or deny such request.

6. Admits that in about 1935 an all black staff and a black principal were assigned to Willard, admit that white students as well as other students, regardless of race, for good cause were allowed to transfer to other schools; admit that Willard became predominantly black in 1935; admit that from the period of time from 1947-52 Willard was all black; admit that the remaining zone of the Willard area was absorbed by the McFarlane school; say that they are without information as to the remaining requests for admissions and that the information known or readily obtainable is insufficient to enable them to admit or deny such requests.

7. (a) Admit with the modification that Dunbar opened as a junior high school, grades 7, 8 and 9 and that in 1934 this school was expanded to include grades 10 and 11 and thereafter became a full high school.

(b) Deny but admit that after 1940 Dunbar and Patterson Co-Operative were the only high schools that had no specific attendance zones with attendance being optional at both of these schools.

(c) Admit that black students attended Dunbar; say that they are without information as to the remaining requests for admissions and that the information known or readily obtainable is insufficient to enable them to admit or deny such requests.

(d) Admit that black 7th and 8th graders were transported from Shawen Acres to Dunbar but state that this policy terminated as of 1950. Deny the remaining requests for admissions.

(e) Deny this request for admission. Dunbar was an optional school and had no attendance zone until 1962.

(f) Admit but state that since 1947 Dunbar engaged in all inter-city athletic events.

(g) Admit but in same correspondence Mr. French states that Dunbar was given no boundary lines and attendance was voluntary.

(h) Admit with the modification that the Dunbar High School was built in a predominatly all black residential area. Said defendants further admit that the N.A.A.C.P. approved the location of the new Dunbar High School.

(i) Admit that in 1962 the new Dunbar was given a geographic attendance zone; deny that this school opened

with an all black student body; deny that Dunbar had a 100% Negro student body from 1962 to present but admit the student body became 100% black in 1971-72; deny that the staff of Dunbar was 100% black from 1962 to present.

7A. (a) Admit.

(b) Admit with modification that enrollment in 1959 included no seniors and that capacity was approximately 1,800 students.

(c) Deny but admit that new Roth included some of the white residential areas in the pre-1959 Roosevelt zone.

(d) Deny but admit that enrollment of Roosevelt decreased by 608 students the year Roth opened.

(e) Say that they are without information as to this request and the information known or readily obtainable is insufficient to admit or deny such requests.

8. Admit corrected request.

9. Admit.

10. Admit that in 1954 of 162 non-traveling black teachers 148 (91.4%) were assigned to five schools with all black pupil populations. Admit that the statement quoted in this request for admissions was the policy of the board in 1954 but deny that this policy continued from that time to the present as inferred in the request.

11. Admit that on November 30, 1954, only 8 full or part-time teachers 1 or 0.6% of the 1409 white were employed in schools having predominantly Negro student population. Admit that in 1954 Superintendent French attributed lack of success to reluctance of white teachers to teach in black schools. Admit that until the late 1960's the policy of the Dayton Board was not to assign or reassign white teachers to black schools against their will. Deny all the remaining requests for admission.

12. Admit corrected request.

13. Admit corrected request.

14. Admit corrected request but for the years 1970-71 as originally requested there were 18 Negro principals.

15. Admit corrected request but for the years 1970-71 as originally requested there were four Negro principals in schools with over 90% white pupil population and one Negro principal assigned to a school with 57.1% Negro pupil population.

16. Admit corrected request but for year 1970-71 as originally requested the District employed 583 Negro elementary teachers. About 385 or approximately 66% were assigned on a full-time basis to schools where the student body was more than 90% Negro.

17. Admit corrected request but admit that of the 36 black counselors employed by system as of 1971-72, twelve or 33 1/3% were assigned to school where the student body was predominantly black. In the 1971-72 school year of the 52 black high school coaches 28 were assigned to schools with less than 50% black student bodies.

18. Admit corrected request but state that of the approximately 1588 white teachers employed in the year 1971-72 32% were assigned on a full-time basis to schools serving pupil population in which their race was in a minority.

19. Deny.

20. Deny.

21. Deny but admit that an HEW compliance review was conducted resulting in a letter from HEW indicating probably non-compliance as to teaching assignment. The Dayton Board voluntarily agreed to reassign the teaching staff in order that the teaching staff throughout the district would have a racial composition that reflects the total staff of the district as a whole.

22. Deny the requested admission but admit that in 1971-72 of the 34,424 pupils in the elementary schools, excepting middle schools, only 2,573 (7.5% of the total) attended schools which were less than 80% black or white while 26,505 (77%) of the total attended schools which were more than 90% black or white.

23. Deny the requested admission but admit that in 1971-72 of the 14,443 black students in elementary schools, other than middle schools, 11,365 were contained in 16 schools that were 78.7% or more black, with but 145 white students in these schools; and of the 19,981 white pupils in elementary schools, 14,168 were contained in 23 schools that were more than 90% white, with but 320 black pupils in these schools.

24. Deny the request admission but admit that in 1971-72 of the 52 elementary schools, not including middle schools, 40 served pupil enrollment of more than 90% black or 90% white while only three elementary schools approximated the systemwide racial mix and that 28 schools contained pupil population more than 99% black or 99% white.

25. Deny.

26. Deny.

27. Deny.

27A. Deny.

28. Deny.

29. Deny the requested admission but admit the following.

(a) From January 1966 to September 1967, thirty classrooms which contained all or predominantly black pupil populations were constructed at a cost of $988,511;

(b) From September 1967 to the present, seventeen classrooms which contained all or predominantly black pupil populations were constructed at a cost of $1,124,206 of which fourteen classrooms were replacement for classrooms destroyed by fire at Edison at a cost of $899,928;

(c) From January, 1966 to September, 1969, two hundred and fourteen classrooms which contained predominantly white pupil population were constructed at a cost of $9.73 million but of these two hundred fourteen classrooms 76 were added to buildings that are currently 30% or more black population. Further, 16 classrooms were replacement for rooms destroyed by the fire at Ruskin elementary.

(d) From September, 1967 to the present, twenty-three (23) classrooms which contained predominantly white pupil population were constructed at a cost of 1.44 million dollars.

30. Deny but admit that there were some predominantly white and some predominantly black schools that have operated under capacity at one time or another. Admit that in 1971-72 there were over 7,000 pupil spaces in black schools also white schools. Said defendants say that the capacity figures for 1971-72 were based on safety code factors per square foot per person and did not take into consideration the education facility and methods of teaching and subject matter taught in the classrooms.

30A. Deny but do admit that some predominantly black schools as well as some predominantly white schools have been overcrowded at various times and admit that new classroom space has been added at some schools that were overcrowded.

31.

(a) Deny.

(b) Admit as substantially correct.

31A. Deny this request for admisison with the following exceptions:

(a) That black students were transported from Shawen Acres past white schools prior to June, 1954 but that this practice stopped in 1954;

(b) That some black students were transferred from Stiv-

ers in 1970 to Roth and Roosevelt as an emergency measure but these students were reassigned the following year.

31B. Deny this request for admission with the following exceptions:

(a) Some white students were reassigned from Roth in 1969 for emergency reasons but were returned to Roth the following year.

(b) A minimal number of white students may have been included in the transfer of students from Jefferson in 1969-70 and 1970-71. However, Jefferson was predominantly black during these years and all the students in a class from Jefferson were assigned by class to predominantly white schools. The effect of these transfers was to provide integration at the receiving schools.

32. Deny the request for admission but admit that eight option attendance areas are presently in existence.

32A. Deny. However said defendants admit that members of the community have in the past expressed their desires for the establishment of optional areas but that the decision for the creation and maintenance of such areas are governed by the following factors:

1. Capacity of school building
2. Accessibility and distance
3. Traffic hazards.

32B. Admit that in 1971-72, 39 white students transferred under the Freedom of Enrollment program that 9 of these transferred to black schools and 30 to white schools. Admit that 460 blacks transferred under the Freedom of Enrollment program and that 456 of these black students transferred to white schools. Deny the remaining request for admissions.

33. Admit.

33A. Admit as substantially in accordance with transportation studies conducted by the defendant Dayton Board.

34. Admit.

34A. Admit.

34B. Admit.

34C. Deny.

35. Deny.

36. Admit.

37. Admit.

38. Say that they are without information as to this request and that the information known or readily obtainable is insufficient to admit or deny such request but admit that in 1951-52 there were 8 black students at Patterson and that in 1963-64 there were 19 black students.

39. Deny.

40. Deny.

• • •

E. ANSWERS OF DEFENDANT WAYNE M. CARLE TO REQUEST FOR ADMISSIONS

Defendant, Wayne M. Carle, by his attorney Asher Bogin, answers and objects to the requests for admissions served on him by plaintiff, as follows:

1. Admits

2a. Admits

2b. Admits

2c. Admits

2d. Admits. With regard to faculty assignment the school directory for 1935-36 shows the faculty to be composed of 7 white and 8 black teachers. For 1936-37, the Garfield faculty was 15 black members.

2e. Admits. Specifically, for the years 1947-48 through 1951-52 the enrollment is shown as 100 per cent black.

2f. Admits.

3. Admits. The McFarlane enrollment in 1963 was 99.6% black and in 1971-72 99.5% black.

4a. Admits.

4b. Admits.

4c. Admits except that the enrollment at Wogaman in October 1972 is 100 per cent black and the faculty consists of 21.8 white teachers and 21.6 black teachers or 49.8 per cent black.

5. Admits

6. Admits

7a. Admits. The faculty in 1934-35 consisted of 19 black and 0 white teachers and a black principal.

7b. Admits.

7c. Admits.

7d. Admits, with the exception that the distance was 3 to 4 miles.

7e. Admits.

7f. Admits.

7g Admits.

7h. Admits.

7i. Admits, with the exception that the enrollment in 1963 is shown as 92.7 per cent black. In 1972-73 it is 100 per cent black.

7A(a) Admits.

7A(b) Admits. The enrollment of 662 in 1959 included no seniors. The following year the enrollment was 816, of whom 84 were 8th graders.

7A(c) Admits.

7A(d) Admits.

7A(e) Says that he does not at this time know whether the facts stated in the Request are correct.

8. Admits corrected Request.

9. Admits.

10. Admits.

11. Admits.

12. Admits corrected Request, with exception that the number of black assistant principals was 15, not 14, as of August 19, 1968.

13. Admits corrected Request, with the exception that of the 15 black assistant principals, 11 were in schools 90 per cent or more black and two were in schools 90 per cent or more white.

14. Admits corrected Request.

15. Admits corrected Request.

16. Admits corrected Request.

17. Admits corrected Request.

18. Says that of the approximately 1847 full time white teachers employed in the 1968-69 school year, about 172 or 9.3% were assigned to schools serving pupil populations 90% or more black.

19. Admits.

20. Admits.

21. Admits that the Office for Civil Rights on March 17, 1969 wrote, "We have completed our analysis of the information gathered during the review and have made the determination that your district is not com-

plying with Title VI of the Civil Rights Act of 1964." and admits the balance of Request No. 21.

22. Admits as substantially correct for elementary, other than middle, schools.

23. Admits as substantially correct for elementary, other than middle, schools.

24. Admits, with the exception that 28, not 25, contain pupil populations more than 99 per cent black or 99 per cent white.

25. Admits.

26. Admits.

27. Admits.

27A. Admits.

28. Admits.

29. Admits as substantially in accordance with the compilation of 1520 classrooms tabulated at a cost of $57,608,482 for the period 1948-1968.

30. Admits.

30A. Admits. The instances cited refer to the reassignment of pupils from Edison School to several perimeter schools and from Jefferson School to other perimeter schools, that were returned to Jefferson, Edison and MacFarlane, all black schools. The word "creation" should be "expansion" in the last sentence.

31 (a) Admits as at least substantially correct.

31 (b) Admits as at least substantially correct.

31A. Admits.

31B. Admits.

32. Admits, to the best of his knowledge.

32A. Admits.

32B. Admits corrected Request, with the change of the word "transported" to "transferred" in the last sentence.

33. Admits.

33A. Admits as in substantial agreement with annual transportation studies since 1968.

34. Admits.

34A. Admits.

34B. Admits.

34C. Admits that the manner in which the middle school policy was implemented by the Board has resulted in substantial continuation of pupil segregation in the schools affected.

35. Admits.

36. Admits.

37. Admits.

38. Admits.

39. Admits.

40. Admits. Not until 1968 was a policy developed to assure entrance of students from all elementary schools.

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F. ANSWERS OF DEFENDANT JANE STERZER TO REQUEST FOR ADMISSIONS

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Defendant, Jane Sterzer by her attorney, Asher Bogin, answers and objects to the Requests for Admissions served on her by plaintiff as follows:

This defendant says that she has searched her recollection and has made inquiry of Dr. Wayne Carle, Superintendent of the Dayton schools, and that she is in accord with the Answers to the plaintiff's Requests filed herein by Dr. Carle.

• • •

VII. RELEVENT PARTS OF THE RECORD OF THE TWENTY VOLUMES TRANSCRIBED DURING THE VIOLATION HEARING HELD IN DISTRICT COURT IN NOVEMBER AND DECEMBER OF 1972 (R. I.).

A. TESTIMONY OF HUBERT D. POORE.

1. Commentary of Trial Court and plaintiffs' counsel.

• • •

[R. I. 148, Vol. 2] MR. DIAMOND: Your Honor, let me make two points clear. First of all, in at least – there are four project applications. In at least three of them there is a statement by the DMHA of the availability of space and the accommodation of nearby schools, schools in the area, or the need for new school capacity to serve these projects.

Earlier in the day I introduced into evidence and read to your Honor the statements by the Dayton School Authorities in relationship to other projects in those instances, not necessarily related to these four particular projects, of their creation of new schools and classrooms to serve the pupils of these populations of these projects.

THE COURT: Mr. Diamond, I am aware that for a substantial period of time so-called public housing, financed by agencies of both the Federal Government and local Government, were specifically designated, some were white and some were black. This is insufficient for our purposes.

If you wish to present this evidence as to these projects, I

am sure that it will state therein for whom the occupancy was intended.

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[R. I. 160, Vol. 2] [The Court] Mr. Diamond, you simply have not passed the first hurdle with this witness, and until and unless you do the Court is going to rule that this is not admissible.

Now, if you have a necessity with this witness and other witnesses demonstrating some participation by the school board, unless that participation in the determination of the character, the occupancy of these projects, until that is established I am going to hold he may not testify.

MR. DIAMOND: Well, I guess what I am having difficulty understanding, Your Honor, is that in terms of a lease agreement the school authorities are the ones that made the lease.

THE COURT: There is no question about that.

MR. DIAMOND: They are the ones who said we are going to lease that space and make it either a black school or a white school.

THE COURT: Well –

MR. DIAMOND: They are the ones who made the agreement.

THE COURT: Mr. Diamond, until you can establish that the School Board participated in some fashion with the original determination that this would be a white or black project, whatever else the Board might have done, they have taken the area as they found it. • • •

[R. I. 202-203, Vol. 3] MR. DIAMOND: Well, Your Honor, what I was going to show through this witness is that he is a parent of a child, he had a family when he moved here, and I was going to ask him from his recollection about specific incidents relating to his school children and neighbors.

THE COURT: This witness has been called as an expert to testify as to policies and I have permitted that. I am not

going to permit his testimony as to individual recollections going on 27 years ago.

You may be seated, Mr. Greer.

MR. DIAMOND: Your Honor, Mr. Poore would testify to the fact that there were white children transported from the Wogaman School attendance area to the Jackson School attendance area in the 1945 school year.

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2. Poore testimony.

• • •

[R. I. 152, Vol. 2] "Question: Mr. Poore, what do those four applications represent in terms of the racial identification, first of all, of the projects? Let's take particularly the DeSoto Bass project where you were located in 1945 when you came on."

A. Well, the proposed Metropolitan Housing Plan, it says the project proposed for race or national group was Negro; and this project, in addition to the present, Negro occupied, which was OH-52, which we had 200 units already there.

Q. Now, to your knowledge, Mr. Poore, while you were at the DeSoto Bass project, were your projects – while you were at DeSoto Bass, were they used for School purposes?

A. Yes, they were.

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[R. I. 156, Vol. 2] Q. With reference to the other project applications in addition to this DeSota, do they show the intended racial occupancy of the project?

A. Yes, they do.

Q. And could you in each instance describe what the intended racial occupancy was?

A. Summit Court is for white; Edgewood Court was for white; and Parkside Homes was for white.

Q. With reference to Edgewood and Summit, do those

documents reveal the racial composition of the particular spot upon which the project was to be located and from which people would have to be removed?

A. Yes, it did.

• • •

[R. I. 183, Vol. 3] A. 143D is surveys of the colored population of Dayton; there is the colored population, the census, and the number of units in DeSoto Bass Court and the temporary housing, which was known as War housing.

For instance, there was 200 for the DeSoto Bass Courts, but the addition of 200 was for the temporary addition. 60 for the second addition to DeSoto Bass Courts, 160 of the Homeview Courts, and 80 for Lakeview, 50 for the dormitory at Phyllis Wheatley and 100 additional dormitory for girls.

Q. Were all these projects designated for black occupancy?

A. Those were designated for black.

• • •

[R. I. 184-186, Vol. 3] A. G? This is data on the War housing application for the past six months, which is dated November 5, 1945. It gives the number of white applications, excluding Vandalia, and then it gives the number of applications for the Vandalia area, the number of Negro applications.

Q. Why is it divided into those three columns?

A. Well, all the white applications except Vandalia were filed in an office downtown, and the black applications were all filed at the DeSoto Bass Courts, and Vandalia homes, which was located in Vandalia, that they made application there.

Q. Was Vandalia homes a white project?

A. Yes, it was.

Q. I have marked for identification Plaintiffs' Exhibit 143H, which is an application for transfer. Could you describe what that is about?

A. This is an application transfer project known as OH-33155 which is 200 units and OH-33234, both of which were located in DeSoto Bass Courts and they were built for war

housing and for families of the veterans when they returned, but they were owned by the Federal Government and the Federal Government transferred them to the Dayton Metropolitan Housing Authority for low-income families.

Q. In other words they were owned originally by the Federal Government and then transferred to you?

A. That's right.

Q. At approximately what time did these two particular projects transfer to your ownership?

A. It was approximately about 1950.

Q. And they were designated for black occupancy?

A. Yes, they were.

Q. Now, Your Honor, I also have marked for identification a series of letters marked Plaintiffs' Exhibits 143J, a collective exhibit, and these are various letters and leases. Would you describe generally what the leases and letters are about?

A. Well, these letters are from the Board of Education to lease space in our project for classes as they did not have space in the school at that time.

Q. Now, what Boards of Education did you enter into lease agreements with?

A. Well, we had one with the Mad River Township.

[R. I. 187-188, Vol. 3] Q. Does PX-143J include lease agreements with the Dayton Board of Education?

A. Yes, it does.

Q. And were lease agreements made for space in the DeSoto Bass and the McGuffey Homes?

A. Yes, it does.

Q. Now, what was the racial designation of the McGuffey Homes?

A. It was white.

Q. And DeSoto Bass?

A. Black.

Q. Now, when you were — was it Executive Director of the DeSoto Bass Courts?

A. I was Project Manager.

Q. Project Manager, excuse me. I am sorry. I got the language wrong.

Q. When you were project manager at the DeSoto Bass Courts, when these lease agreements were in effect, were black pupils and black faculty assigned to that leased space?

A. Yes, there was.

• • •

[R. I. 213-215, Vol. 3] Q. Mr. Poore during the period of these lease agreements with the DMHA to use the building for school purposes, the DMHA didn't control or influence the assignment of pupils or faculty, did they?

A. No, they did not.

Q. That was within the control of the Dayton School Authorities?

A. That's right.

Q. On the lease agreement that Mr. Greer just referred to, did you find a copy of that?

A. Yes, I found a copy.

Q. And what form is that? Does it have a form number on it at the very top?

A. That's SP1913.

Q. And would you read the first line of that, the underlined portion of the heading of the lease agreement?

A. At the very top, you mean?

Q. Yes.

A. "Lease or tenant activity and other non-commercial use on Federal War Housing Projects by Federal local authorities."

Q. And is that a form by either the Federal or State authorities? I am speaking of the Federal Housing Authority.

A. I would say it is probably Federal. I am not for certain.

Q. And at that time War housing was required to be segregated on a racial basis?

A. Yes, it was.

• • •

B. TESTIMONY OF HOMER ROYER.

• • •

[R. I. 229, Vol. 3] Q. Do you recall telling the HEW team that investigated the school system that one of the reasons for putting black teachers on substitute status at first was because of the questionable nature of some of their qualifications because of graduation from southern institutions?

A. I don't remember making that statement. I may have made it.

Q. Would it be true?

A. There would be some institutions about which we had little information.

[R. I. 293, Vol. 4] Q. In your opinion, based upon your experience in this area, did the placing of white or black teachers one way or another in the school system have anything to do with parts of the Dayton community becoming black or white?

A. Comparatively little, I should think. I presume some people fled from a community because of approaching integration, but I don't think assignment of staff was a basic decision in that regard.

Q. And to what do you attribute the changes in communities?

A. Well, of course, we discussed many, many times the matter of housing, which is such a difficult one for everybody to solve, was the important factor in the change in communities. I don't know if that is a part of this court case discussion or not.

Q. Did the composition of the student bodies in the various schools in the Dayton System reflect, in your opinion, anything other than the composition of the neighborhoods in which those schools were located?

A. That was basically what they reflected I would assume.

• • •

C. TESTIMONY OF PHYLLIS B. GREER.

[R. I. 344-348, Vol. 4] Q. State your full name and occupation, please?

A. Phyllis B. Greer, School Community Services, Dayton Board of Education.

Q. Mrs. Greer, how long have you been a resident of Dayton?

A. All my life.

Q. You attended public schools in Dayton?

A. Yes, I did.

Q. Where did you first go to school?

A. I first went to school at Weaver Elementary School.

Q. I hesitate to ask you this, but could you tell me the year, Mrs. Greer?

A. Yes, 1923-'24 was my first year in kindergarten.

Q. And that was at Weaver, correct?

A. Yes.

Q. What was the racial composition at Weaver at that time?

A. There were relatively few black children at Weaver at that time.

Q. And what school did you attend after you left Weaver?

A. I went to Roosevelt High School in the seventh, eighth, and ninth year and to Dunbar High School in the tenth, eleventh and twelfth.

Q. Would you give me the rest of your educational background?

A. Yes. After graduating from Dunbar High School, I went to Wilburforce University and earned a BS Degree, came back to Dunbar High School and taught until 1945-'46, was out on maternity leave two years, went to Willard School and taught there until 1958 when I became principal of Carlson Elementary School and went from Carlson Elementary School to supervise the office of EEO at the Dayton Board of Education.

Q. Excuse me. What is the office of EEO?

A. Equal Educational Opportunity which was a title for office.

Q. And after that?

A. After that I began work on school community services.

Q. What did you teach when you were assigned at Dunbar?

A. English.

Q. And at Willard?

A. I taught the fourth, fifth and sixth grades periodically during that time, not all the same year.

Q. And then you were principal at Carlson; is that correct?

A. That's correct.

Q. Is the VA Hospital in the Carlson area?

A. Yes.

Q. Can you pinpoint the years you were at Carlson?

A. From 1958 to the end of the year 1969. I went to the Board of Education in September of 1969.

Q. O. K. The children of the staff at the VA Hospital, were they white or black?

A. Most of them were white. I didn't know of any black youngsters who lived on the VA grounds.

Q. They have residents actually on the grounds themselves of the hospital?

A. Yes, I think they were the children of the doctors and other professionals there.

Q. They were in the Carlson Elementary zone. Is Carlson a school with a substantial black enrollment?

A. When I went to Carlson, the enrollment was approximately 213. There were a few whites there but they were substantially all black students at Carlson.

Q. And that would be 1958?

A. That's correct.

Q. And do you know where the white children from the VA Hospital site went to school?

A. They did not go to Carlson. Some of them went to Jackson Elementary School. I don't know where the others went.

Q. Was Jackson a black or white school at that time?

A. Jackson School at that time was predominantly white.

Q. Do you know how they got to the Jackson School?

A. No.

Q. Did they walk?

A. After my initial years there, there was one doctor who chose to send his kindergarten child to Carlson, and from him I learned the children went by a blue bus to the other schools.

Q. Did any of those children to your knowledge go to Residence Park at the time when it was black?

A. This is what I have heard.

Q. You don't know that?

A. No, I don't know that.

Q. You do know about the Jackson School?

A. Yes.

Q. Are you familiar with Shawn Acres? Can you tell us what it is?

A. Shawn Acres is a children's home, a home for parentless children, orphans.

Q. Does it have both black and white children?

A. Yes.

Q. Do you know where it is, what school zone it is located in?

A. It is on North Main Street.

Q. Has it always been there or was it located somewhere else?

A. In the very early years it was on Summit Street, on South Summit. It moved then to North Main.

Q. Do you have any idea when it moved?

A. Well, I remember that in the '30's youngsters were being bussed from Shawn Acres to Garfield School, so it would have to have been prior to that time, sometime prior to that.

Q. And the youngsters who were being bussed to the Garfield School, were they black or white?

A. They were all black.

Q. And was the Garfield School a black school or white school?

A. Black.

Q. Do you know what school they would have attended had they attended the school zone in which the school was located?

A. No, I don't remember the closest school to Shawn Acres.

• • •

[R. I. 476, Vol. 5] Q. Now, when your testimony ended, I believe you were at the map showing the Judge where the Garfield School was with relationship to the transportation of Shawn Acres.

• • •

Q. What was Shawn Acres?

A. Shawn Acres was a Children's Home.

Q. And did it have both black and white pupils?

A. Yes.

Q. Now, could you step to the map with the Court's permission and show the Court where the black pupils went to school?

A. Yes.

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THE WITNESS: Shawn Acres is located up in the area of Loos School and the students from Shawn Acres were bussed to Garfield School which is three blocks from McFarlane School on Fifth Street.

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[R. I. 479-480 Vol. 5] Q. Could you answer the question, Mrs. Greer?

A. As a second grade student at Weaver School, I was tried out for a Christmas play and my teacher wanted me to take the part of an angel and the teacher who was in charge

of the play indicated that I could not be an angel in the play because there were no colored angels. During my third year of school, I remember that I was called to the platform, the little low platform in the front of the classroom and the rest of the class was told that to look at Phyllis Blackburn's hair. It was braided and had ribbons on it and she would like for them to come to school with their hair like this rather than with the knots and bed lint in it, and of course, as I went home that day I had a little difficulty with the black children who had knots and bed lint.

We were told that as we went to school preparatory to going – signing our election blanks, we were counseled, and this happened at Roosevelt, we were counseled to go into the college preparatory courses were useless for the Negro students because there were not the job opportunities and not the places that we could use a college preparatory course and should then rather take the general course.

Q. Now, did you attend the Weaver School through the eighth grade?

A. No. I attended Weaver School kindergarten through sixth and I attended Roosevelt High School, seventh, eighth and ninth. I attended Dunbar High School from ten through twelve.

Q. Why did you move, transfer from Roosevelt High School to the Dunbar High School?

A. I transferred from Roosevelt High School to Dunbar High School because my family felt that there were practices that were in evidence at Roosevelt –

• • •

[R. I. 481-494, Vol. 5] A. (Continuing.) I was a student at Roosevelt those three years prior. Blacks were not allowed to go into the swimming pools, blacks had separate showers, so we requested from our parents to be allowed to go to Dunbar.

One of the assistant principals at Roosevelt at that time came to our home and asked that we not be permitted to go to Dunbar because they wanted all the nice colored children to stay at Roosevelt, but we did go to Dunbar.

Q. And why did you go to Dunbar?

A. I went to Dunbar because I felt that if there was going to be – if we were going to be separated by anything, we might as well be separated by an entire building as to be separated by practices.

In fact, when I went to an eighth grade social studies class I was told by a teacher, whose name I still remember, I won't quote it but if I am asked to I will, that even though I was a good student I was not to sit in the front of the class because most of the colored kids sat in the back.

Q. Now, Mrs. Greer, while you were at the Dunbar High School, in terms of a separate building, were there other types of separation from the rest of the school system?

A. Well, when I went there in 1933, and certainly when I graduated in 1936 and when I went back to teaching in 1940, our athletic teams did not compete with the white schools in the city. Our athletic teams competed with other schools out of the state, even, that were black.

Q. Now, when you first – after you finished college – where did you go to college?

A. I went to Wilburforce University from '36 to '40.

Q. And when you returned to the Dayton Public Schools where were you assigned?

A. Dunbar High School.

Q. And at the time of your assignment were there any black teachers teaching white pupils?

A. No.

Q. And how long did you remain at Dunbar?

A. I remained at Dunbar from '40 to '45.

Q. Now, during that period of time, around 1945, are you personally aware of the faculty assignment that took place at the Wogaman School?

A. Yes, I am.

Q. What was that?

A. When school closed in June of 1945, there was an entire white staff at Wogaman. When school opened in September of '45, there was an entire black staff at Wogaman under a black principal, Robert Braxton.

Q. And at the same time were white pupils who lived in the Wogaman area transferred by bus out of the Wogaman School?

A. Yes.

Q. And where did they attend school?

A. They attended Jackson School.

Q. So that in the 1945 school year, '45-'46 school year, Wogaman had an all-black staff and all-black pupil population?

A. Yes.

Q. Now, while you were at Dunbar were black youngsters ever transferred there from Roosevelt?

A. Yes. I taught several black youngsters who had been behavior problems at Roosevelt and their parents, upon enrolling them in the school, –

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Q. Would you state –

A. The disruptive black students from Roosevelt were assigned to Dunbar.

Q. And, to your knowledge, were any of these disruptive black students assigned to any other high school in the system?

A. Not to my knowledge. I could not verify that or deny it.

Q. Now, when did you leave the Dunbar School as a faculty member?

A. I left Dunbar School on maternity leave in '46.

Q. And what happened after you returned from your maternity leave?

A. We had to have two years. When I went back and asked to get the job – I was told when I left that the teacher assigned to teach English in my place would be on a permanent substitute basis. When I went back the teacher had

been assigned as a regular classroom teacher. I was told that there were no English spots in Dunbar, there were no French classes in Dunbar that I could fill in, and was asked to go to Willard School to teach on a temporary certificate until there was an opening at Dunbar in English or French.

Q. And at that time you had a high school certificate in English?

A. Yes.

Q. And French?

A. Yes.

THE COURT: Excuse me. Mrs. Greer, how long had you taught at that point?

THE WITNESS: I had taught from '40 to '49.

THE COURT: Didn't you have tenure?

THE WITNESS: Yes, but I was not really assigned to the school in which I – I was given a job. I was assured a job.

THE COURT: All right. Thank you.

BY MR. DIAMOND:

Q. And you were assigned to what school?

A. Willard.

Q. And that was in an elementary capacity?

A. Yes.

Q. And what grades did you teach at that school?

A. I had a fourth year class of students who – they had taken an overflow of students from DeSoto Bass Courts, who came from DeSoto Bass to Willard to school. There was an overflow at that time from DeSoto Bass and those youngsters were – one of those classes was the class I taught at Willard.

Q. What schools was the Willard School closest to?

A. At that point in time, I am not sure because Miami Chapel had not been built. It was the closest school at that point in time to Wogaman, but there were other schools equal distance or closer, one school.

Q. All right. Thank you.

Now, Mrs. Greer, have you on various occasions both for HEW investigations and for investigations by Dr. Carle, and

on requests by Plaintiffs examined the faculty directories from your own personal knowledge?

A. Yes. I was asked to do that by Title 6 Office the first time.

Q. At that point in time what was your position in the school system?

A. I was working at that point in time with the Office of EEO, the final months of the Office of EEO.

Q. And from your examination of these faculty directories, can you state from the beginning and describe the pattern of faculty assignments?

A. Yes. The first directory that was available is a 1921-22 directory. At that point in time there were seven black teachers in the Dayton School District. All of these teachers were assigned at Garfield.

From '31 to – from '21 to '31 the number had grown to 10 black teachers.

Q. And where were they assigned?

A. They were at Garfield and one black teacher, other than Garfield, a teacher, Maude Walker, was assigned to Weaver but she had an un-graded class and she had an ungraded class of all black boys.

Then in 1933 there was then again the largest number of blacks hired and these teachers were hired as staff people for Dunbar High School.

In 1950 or '51 a teacher was assigned, a black teacher was assigned to Weaver School.

In 1955 two black teachers were assigned to Jackson School.

Q. Now, let me interrupt you one moment. You have testified about the racial change both in terms of pupils and teachers at the Wogaman School.

Now, could you describe for me the racial change in teachers at the Garfield and Willard Schools in the mid-1930's?

A. In 1934-35 these directories show there were 10 black teachers and six whites at Willard School. And then in '35-'36 that staff became all black.

The next year, '36-37, there were roughly 38 percent white teachers at Garfield and –

THE COURT: I am sorry. What –

THE WITNESS: '35-36.

THE COURT: Excuse me. 38 percent white teachers?

THE WITNESS: There were 38 percent black teachers.

THE COURT: Black. Thank you.

A. And then the year '35-36, that staff became all black.

Q. And during those same periods of time did the pupil populations become all black?

A. Yes.

Q. At these two schools?

A. Yes.

Q. Fine. Now, could you continue through? We were at 1951 and we had teachers assigned to Jackson in terms of black teachers assigned to the Jackson School.

A. Yes. There was from that time on gradual assignments of black teachers in schools that had some white students in them. However, in going through our directories we found that these black teachers were assigned to schools that were already becoming black as far as the elementary grades are concerned.

I think that we were able to substantiate that in 1955 a black teacher was assigned – a black high school teacher was assigned in a school where it was not completely black.

Q. Now, Mrs. Greer, could you look at Plaintiffs' Exhibit 130D, it is the 1960 school year.

Now, during this period of time, from the early 1960's through 1968, am I understanding you correctly that you think black teachers disproportionately were being assigned to black schools while at the same time schools with black pupil populations in terms that they were beginning to increase or had increased in black pupil population and white teachers were being assigned disproportionately to virtually all white pupil populations?

A. As I look at Exhibit 130D, this indicates that that was

the case. We have all black – high percentage of black student body at Dunbar and high percentages right down the line to indicate where there were high percentages of black students we did have high percentages of black teachers and vice versa. This is the case.

Q. Now, throughout this period 1951 to 1968, were there many teacher assignments, both white and black, in terms of teacher turnover, transfers, and new hires?

A. I could not verify that there were. There were always constantly new teachers coming in.

Q. So at the same time you had this pattern of assigning black teachers to schools that were becoming black, white teachers, new teachers or transfers, were being assigned to white schools?

A. Yes.

Here again, we don't want to go into the area of hearsay, but it was generally – it was felt by those of us who were teaching – I felt – let's put it on this basis, I felt –

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A. I felt that schools with predominantly black student bodies constantly receiving black teachers identified us as being black schools.

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Q. Mrs. Greer, what was the effects in terms of the assignments of the black teachers to the schools that were becoming black and white teachers to white schools?

A. As a parent, I had a daughter going to Roth High School when the staff was relatively an integrated staff and so was the student body. But as more and more black youngsters came to Roth High School, the staff became increasingly black, and my concern was to have my daughter involved in a school situation that would help her to live in a pluralistic society, and I felt I was being denied this privilege.

Q. Now, in retrospect, when you look at the situations that existed in 1933, '34, '35, '36, in the Garfield and Willard

and in the Wogaman Schools as the type of thing that you are describing – from 1961 to 1968 did occur, is there any relationship between those two?

A The relationship as we were able to establish by the assignments of staff indicated that as the student body became black, staff also became black separating the schools.

Q. Now, after you came back from maternity leave in 1949, how long did you stay at the Willard School?

A. I stayed there from '49 to '58.

Q. And where were you assigned then?

A. I was then assigned as principal at Carlson School.

Q. And was that the year the school opened?

A. That is correct.

Q. And what was the racial composition of the school when it opened in terms of pupils?

A. I think – I remember correctly that the student body was 213 youngsters, and we had about ten to twelve white students.

Q. And what was the faculty composition?

A. Totally black.

Q. And in 1953, when the Miami Chapel School opened, what was its pupil composition?

A. Black.

Q. And faculty?

A. Black. There was one white teacher.

Q. And at the Belle Haven School which opened in 1954, what was the pupil composition and the racial composition of the staff and pupils?

A. The pupil composition was a hundred percent white and the staff was a hundred percent white.

Q. And in 1957, when the Louise Troy School opened?

A. It was black, with I think – with the exception I think about maybe 95 percent black and the entire student body was black.

Q. And in 1958, when the Shoup Mill School opened –

THE COURT: I am sorry, Mr. Diamond. Which one?

MR. DIAMOND: Shoup Mill.

THE COURT: Shoup Mill. Thank you.

A. Our records substantiate that the staff was a hundred percent white as was the student body.

MR. DIAMOND: Your Honor, may I note for your attention Plaintiffs' Exhibit – I believe it's PX-3 or 4 which shows new schools opening and additions to schools showing pupil composition and staff composition at the time of the opening of the school and with the addition to the school.

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[R. I. 495, Vol. 5] Q. Mrs. Greer, in the questions that have just been asked you concerning certain specific schools, the composition of the student body in those schools was a reflection of the composition of the neighborhood in which they were located, isn't that right?

A. In some instances. As I pointed out, there were some youngsters in the Wogaman School District who lived in that district who did not go to school in that district, so this was not a true reflection of the composition of that district.

Q. There were times when the Wogaman District was overcrowded, were there not?

A. There were times when the Wogaman District was overcrowded.

Q. And I think you testified that at one of those times children from that district went to Jackson School, which was the school of the adjacent district, isn't that right?

A. That is correct.

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[R. I. 497, Vol. 5] Q. Then if we move up to the Washington Elementary School District, there is a black neighborhood in that area on Springfield Street that has existed for many, many years in Dayton, is there not?

A. Yes, because I remember many of those youngsters came to Dunbar High School when I was a student there.

They came all the way from that distance to Dunbar High School.

Q. Which they have the option of doing, as I understand it?

A. Well, yes, they had the option of doing that then but nobody else had a like option.

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[R. I. 502, Vol. 5] A. It was interesting, however, since you are just asking for that purpose, to note that the optional areas between Roosevelt and Colonel White did do an excellent job of siphoning off white students that were at Roosevelt.

Q. All right. And right now, the students who are living in that optional area north of all of these natural boundaries are largely black people, are they not?

A. Right now, yes.

Q. And the effect of that option is to permit them to go to Colonel White High School, is it not?

A. I don't know whether it is or not, but I do know, as I said before, at the time when I was closely involved with Roosevelt, it did do the job of siphoning off whites. Of course, the neighborhoods have changed.

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[R. I. 515, Vol. 5] Q. And as the neighborhoods changed, the compositions of the schools serving those neighborhoods changed?

A. Yes. But I would certainly like to re-emphasize that assignment of staff to go along with the neighborhood change was the kind of thing that gave the impression of the schools designed to be black, because black staff increased as black student bodies increased.

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[R. I. 520-523, Vol. 5] Q. When you went to Roosevelt High School there was no Colonel White High School, was there, Mrs. Greer?

A. Colonel White was a junior high school.

Q. All right. But there was no four-year high school in that location?

A. Yes.

Q. And am I not also correct that the only high school north of Wolf Creek would be Fairview High School which is quite some distance to the north of that area?

A. Yes.

Q. Now, by the time that Colonel White became a four-year high school the only way that you could get from this area north of Wolf Creek to Roosevelt by public transportation would be to take a bus all the way to downtown Dayton and then transfer to come all the way back out to Third Street, isn't that correct?

A. Would you rephrase your question?

Q. If I were living in this optional area, when Colonel White became a high school as opposed to Fairview High School, to get from my home down to Roosevelt High School without walking through the Dayton Tire and Rubber Plant and going over the railroad tracks and crossing either the Summit or the Broadway Bridge, I would have to take a bus on Salem, go to downtown Dayton, get a transfer and come back out Third Street to Roosevelt, wouldn't I?

A. Yes, but I do know at that point in time there were youngsters crossing these various kinds of boundaries to walk to school.

Q. Whereas, when the Stivers District was expanded in the past few years, the district was expanded in order to take over the essentially black elementary zones of Irving and Whittier, was it not?

A. Yes. That was planned when the boundaries were changed for Stivers.

Q. So that had the effect of achieving a greater degree of integration at Stivers High School, didn't it?

A. Yes, in the residence area when that occurred.

Q. And to get to those zones from Stivers by public transportation you would have a straight shot on the bus instead of having to go down and transfer and come back out, isn't that right?

A. If we consider only bus transportation, yes. But automobiles and walking and so forth were implemented by children living in the city to cross these various kinds of barriers.

Q. Mr. Diamond asked you about Allen Elementary School. That school was actually built in 1899, wasn't it?

A. Yes. The addition of Allen Elementary is considered a separate school on our listing, but I would assume that it is considered a separate school generally.

Q. But that addition was made in 1969, wasn't it, so a school that existed in that area for 70 years?

A. They are considered as separate schools in our listings.

Q. In the 1969 school year, to your knowledge was that at a time when there was substantial space in both white and black schools throughout the system as far as capacity?

A. Yes. We determined that there was space in many schools that we were not utilizing.

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D. TESTIMONY OF CHARLES H. RIVERS.

[R. I. 350, Vol. 5] Q. Could you state your name, please, sir?

A. Charles H. Rivers.

Q. What is your present occupation?

A. Project Director, Title 8 Program, Dayton Public Schools.

Q. When did you move to the Dayton area?

A. I started in Dayton in the summer of 1950, just visiting, working, and I would leave in the fall going back to school. Permanently in 1954.

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[R. I. 367, Vol. 5] Q. Mr. Rivers, I think I have a little logical problem in my mind as to your last several answers.

Do I understand your testimony to be that in your opinion the assignment of a black faculty to a school makes it identifiable as a black school regardless of what the school student composition is?

A. No. I said black faculty to a black school.

Q. When the school is already black, as far as student composition is concerned?

Let me withdraw the question. I don't know that it is really a question.

I take it what you are really saying is that a school becomes racially identifiable when its student population becomes either predominantly or all-black or predominantly or all-white, isn't that right?

A. That's right.

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[R. I. 377, Vol. 5] Q. Aside from what you were told, do you actually know of any children that live in such an optional area or what the boundaries of it were?

A. The boundaries in terms of what?

Q. In terms of streets.

A. I do not recall the names of streets.

Q. Do you know of any specific students living in the area where the option occurred?

A. Not by name.

Q. During this period when you were at Jackson School, there were substantial numbers of black students in all three of those neighborhood schools, were there not?

A. Westwood was in a transitional period. I don't know what you mean when you say substantial, but as I say, it was in a transitional period. Jackson Elementary did have a few white students. Residence Park was basically white.

Q. But there were some black students in Residence Park, were there not?

A. I couldn not attest to that because I did not see any. I would assume so since there were a few blacks moving in that particular area at that time.

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E. TESTIMONY OF MARY WHITE.

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[R. I. 389-395, Vol. 5] Q. Just state your name and occupation, please, ma'am.

A. Mary Louise White, Executive Secretary to the Superintendent.

Q. Miss White, how long have you been with the Dayton Public Schools?

A. I came to the Dayton Public Schools in September of 1961.

Q. Where were you employed at that time in the system?

A. I was employed as a secretary to the Assistant Superintendent for Personnel.

Q. And that's Mr. Royer?

A. Right.

Q. Were you acquainted, Mrs. White with the records kept in that office with respect to teachers?

A. Yes. It was a two-girl office and each of us were responsible for records, filing and keeping records.

Q. Can you describe for me at the time you came to the office in 1961 the method of keeping records relating to the substitute teachers?

A. Well, it was kept in a file folder. When they were employed, it was put into a file folder and there was a code a mark for the black substitute teacher.

Q. Have you at my request by subpoena brought some examples or an example of those files with you?

A. Yes, sir.

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Thereupon, the document referred to was marked for identification as Exhibit 158.

Q. In the substitute records can you tell me what color cards were used for white teachers and what color cards were used for black teachers or was there only the indication of the dot?

A. Just the indication of the dot.

And may I show this, Judge Rubin?

THE COURT: Yes.

A. This was the card that was kept at the call desk. This is where the calls were made for substitutes. It likewise had the same designation.

Q. All right. Now, when you say at the call desk, can you tell me what the call desk was?

A. Well, of course, we are a large system and our calls come into a central call center for substitute service. At the time I started it was a switchboard. The switchboard operator handled these with the aid of an assistant part time.

Then we reached a point where we needed a fulltime substitute service office, and we now have that designated within the personnel department.

Q. So the cards of the jacket which you just demonstrated with the blue dot were maintained at the call desk?

A. It was maintained in the personnel office. The one that is inside, this happens to be a former teacher, a former substitute.

Q. I see.

A. This was kept at the call desk.

Q. That would be the jacket?

A. The information on what subjects this person could teach as well as certification and this type thing.

Q. Would you illustrate the other card to the Court?

A. The other system that was kept –

Q. No, I am sorry. Is there another card for the substitute other than the one you have just illustrated?

A. No, but for regular teachers. The other cards describe –

Q. For regular teachers?

A. Yes, our applications for regular teachers.

Q. Now, the blue dot does indicate a black teacher, is that correct?

A. Yes, that is right.

Q. How long were these records kept in that office, or how long were you familiar with them?

A. They were there as long as I was there.

Q. And that was through what date?

A. From September of 1961 through – well, it was the latter part of July of 1967.

Q. All right. Now, what about regular teachers?

A. The regular teachers applications came to the personnel department and, of course, we kept a cross-card file. This was a buff card. It was by subjects in alphabetical order, and the regular buff card was for the white teachers, and then we had blue cards with the subjects listed for the black teachers.

Q. Did you also have pictures of the teachers on the cards?

A. No, not on the cards. The only time a picture was kept was after employment, when a person was on the payroll.

Q. And you have a picture of the file?

A. After employment, yes.

Q. In other words, even if the dot had been removed or you had different colored cards, you could still identify the race of the teachers?

A. Yes.

Q. What was the practice during that time with respect to the assignment of the substitute teachers?

A. As far as I know, and of course the substitutes were called from the other switchboard, as I said, it was a practice that black teachers – black substitutes went to black schools and whites went to white schools, as was common with the assignment of regular teachers.

Q. Now, were black teachers sometimes sent as substitutes to white schools?

A. Yes.

Q. You say this was a general practice?

A. Yes, sir.

Q. With exceptions?

A. Yes, sir.

Q. Were you personally aware of these assignments, and, if so, could you tell me how?

A. Yes. I was personally aware of the assignments. We were a small office. We each knew the other's job, and in times of illness I pinch-hit for someone else who did the calling.

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[R. I. 398, Vol. 5] Q. And insofar as regular teachers are concerned, the buff and blue cards situations you have referred to ended in '63, to the best of your recollection?

A. To the best of my knowledge it did.

Q. Now, were you the person that was in charge of these personnel records or was the other girl?

A. The personnel records were a matter that was shared. The substitute teachers' cards were primarily the responsibility of the clerk-typist in our office, but of course we were a two-girl office and we each knew the other's position and we did interchangeably work in each other's positions.

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[R. I. 401, Vol. 5] A. That was the practice.

Q. And do I understand correctly that the reason for the blue dot on that card was that sometimes you would get specific requests for black substitute teachers?

A. That is correct.

Q. And those requests would come from school principals, I take it?

A. Yes.

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Q. Just to clear one matter up, you said the purpose for the cards was if you got requests for black teachers. Did you

also say the practice was assign black substitutes to black schools and whites to white schools?

A. To the best of my knowledge, it was in my early days there.

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F. TESTIMONY OF ROBERT L. GREEN.

[R. I. 405-407, Vol. 5] Q. State your full name and your occupation, please.

A. Robert L. Green, Assistant Dean — rather Dean now, Urban College, Michigan State University, Professor of Educational Psychology.

Q. And would you give us your educational background, please?

A. Elementary School, Detroit, Michigan; graduate of Northern High School, June 1952; Bachelor's Degree, Psychology, 1952, San Francisco State College; Master's Degree, 1960; Psychology, San Francisco State College; Ph.D., 1962, Michigan State University, Educational Psychology.

Q. Would you give me your work experience, please?

A. Professionally, I have functioned as a group counselor.

Q. Excuse me. Would it help you to have data to recall it all?

A. Yes.

Q. Keep your seat, Doctor. I will bring it to you.

A. Beginning very briefly in 1959-1960, I was a Research Assistant at the Langley-Porter Psychiatric Clinic at the University of California Hospital. I have been a School Psychologist with the Oakland System employed by the Juvenile Court of San Francisco as Group Counselor, Psychologist with the Lansing Child Guidance Clinic, and I came from the University ranks from graduate student instructor to assistant professor to associate professor to full-time professor and now I am administrator at the University.

Q. In 1965, did you have a particular employment with the United States Office of Education?

A. In 1965 I was principal investigator of a research project in Prince Edward County, Virginia related to educational status of approximately 1700 black youngsters who were out of school as a function of school closing in that community related to a school desegregation case, and I was primarily responsible for the research data which provided the Justice Department with an opportunity to negotiate with school members in that community in an effort to reopen the schools.

Q. All right. Did you hold a position in 1965 also with the Southern Christian Leadership Conference?

A. I was a National Education Director for the Southern Christian Leadership Conference during that period of time.

Q. All right. In 1967, did you hold another position or direct another project for the United States Office of Education?

A. In 1967, I believe, the summer of 1967, during that year I was primarily responsible for developing with the support of the U. S. Office of Education a major basic adult education project in the City of Chicago cooperatively with the Michigan State University.

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[R. I. 433, Vol. 5] Q. Dr. Green, I believe I informed you that the faculties were desegregated as a result of HEW action in 1970.

Do you have an opinion as to whether or not the effects of this history of faculty assignment persist in terms of identification of schools as black or white in the school district after the changing of the faculties as was done in this case?

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A. Yes. The answer is yes, Mr. Lucas. When there has been historical practice of placing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains

that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentialy uni-racial or predominantly black or predominantly white.

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[R. I. 457-464, Vol. 5] A. THE WITNESS: If it is a 100 percent black city, it would be then perceived perhaps as a City school or community school, but in the context of a city in which you have a range of racial groups, it is difficult to perceive a school as being other than a black school. I would guess if one went to Westchester County, one might perceive those schools as general community schools, or Gross Point, Michigan where there are no blacks at all, one would perceive those schools as community schools, schools within the general community, but in the context of a racial range in which you have blacks, whites, and in many Texas communities browns, schools then become racially identifiable in the context of the general composition of the community. See, the perception of a school develops within the context of a general community and there is no other way to perceive that school except in the context of the broader community.

So, your Honor, if I might make this final statement, in the context of Dayton, Ohio, even though I haven't spent the night in Dayton and I have only been to the airport and I have only driven through the city, I would presume there are blacks and whites living in the City of Dayton; is that correct, sir? And if blacks and whites are living in the City of Dayton, Ohio, if that is a correct assumption and I may be incorrect, if it is a correct assumption, then when you have in the context of that community an all-black school, if you have a pupil composition of a school that is all black, even though the faculty is desegregated, those schools are perceived by black people, by white people, by black teachers, by white teachers, by black administrators and white administrators as being black or white.

BY MR. GREER:

Q. And it wouldn't make any difference what color the faculty was?

A. The racial composition of the faculty, sir, alone does not allow that perception to change.

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Q. By the same token, if we had a school whose racial composition was totally white and we had an all-black staff in that school, it would still be perceived as a white school, would it not?

A. That is correct, and that is in the same context of my last response.

Q. All right. Now, let's move through a few more examples and I will try not to make the list too long. Assume that in 1950 and 1951 the student population of Weaver Elementary School was 69.9 percent black. That would be perceived as a black school, would it not?

A. In 1960? What year, sir?

Q. You don't have to look at any paper. I am asking you to assume this for the sake of my hypothetical question. Assume that in 1950 and 1951 the student population of Weaver Elementary School was 69.9 percent black. That would be perceived as a predominantly black school situation, wouldn't it?

A. It could be.

Q. And the fact that the school had an all-white staff at the time wouldn't change that perception, would it?

A. That's true.

Q. Now, consider the same school, Weaver Elementary School in 1958 and 1959 as having a 98.8 percent black student population. It would certainly be perceived as a black school, would it not?

A. Yes.

Q. And the fact that the staff of that school was integrated on a 50-50 basis black and white wouldn't change that perception, would it?

A. That does not change that perception of the school being a black school, that is correct.

Q. Now, let me ask you to assume that in 1958 and 1959 Edison Elementary School had 80 percent black students. That would be perceived as a black school, would it not?

A. Yes.

Q. And the fact that the staff was only 19.2 percent black wouldn't have any relevance to that community perception, would it?

A. That's correct.

Q. Now, assume in 1958 and 1959 Jackson Elementary School was 98.5 percent black insofar as student composition is concerned. That would be perceived by the community as a black school, would it not?

A. Yes.

Q. And the fact that the staff was only 27.3 percent black would not change that perception, would it?

A. That's correct.

Q. Assume that in 1958 and 1959 Irving Elementary School was 96.6 percent black and student composition. That school would be perceived in the community as black, would it not?

A. That's correct.

Q. And the fact that the staff was only 27.8 percent black would not change that?

A. That school would yet be perceived as black school in the context of Dayton in the context of my prior response.

Q. Now, let me ask you about Highview Elementary School which in 1958 and 1959 had 82 percent black students. Your answer would be the same, would it not?

A. Yes.

Q. And it would make no difference that the faculty at that school was only 17.9 percent black?

A. That school would yet be perceived as being essentially a black school.

Q. And in 1958-1959 if Whittier School had 95.6 percent black students, it would be perceived as a black school, wouldn't it?

A. That's correct.

Q. And the fact the staff was 34.4 percent black would have no relevance, would it?

A. That's correct in the context of how that school is perceived.

Q. And in 1958 and 1959, let's go to Roosevelt High School which had 94.5 percent black students. That would be perceived as a black school, wouldn't it?

A. That's correct.

Q. And the fact that the staff was only 9.5 percent black at the time would not change that perception?

A. That's correct.

Q. Assume that by 1963 and 1964 the percentage of blacks on the Roosevelt staff had grown to 26.8 percent black. That wouldn't change the perception of the school, would it?

A. No.

Q. It would not surprise you to find that the school still had the same 94.5 percent of black school composition, would it?

A. Today?

Q. As of the time of the increase of the blacks in staff, that would not be surprising to you, would it?

A. No, it wouldn't. In terms of the prior figure you quoted, the school is remaining black in terms of pupil composition.

Q. All right, and all I am really trying to establish is that the percentage of blacks on the faculty have no relevance to that perception; isn't that true?

A. It doesn't change the perception. If I might precisely state my point again to make sure it is fully understood by the Court, desegregating the faculty of a particular school community when in the past it has been a systematic placement of teachers to schools based on race, based upon the racial composition of the school and using the race of the teacher as a factor, simply desegragating the faculty without at the same time desegregating the pupils or students within that system does not change the community perception of that school.

Q. All right. I think I understand that point and the only point I am trying to make which I think I also understand from your testimony is that the actual faculty structure of the school doesn't really have the same kind of effect on the community perception of the school as the student population.

A. It doesn't have a full effect. It is important to desegregate a faculty, but it does not change the full perception of the community of that school.

Q. In fact, in your own individual case, the high school that you went to in Detroit you characterized as an all black school; isn't that true?

A. We had white teachers.

Q. You had all white teachers, did you not?

A. No, we did not. There were some black teachers at the high school. The coaches were black, basketball – well, the football coach was black and the track coach was black and there was a math teacher that was black. There was a very limited black teaching faculty at my high school. If I could take a guess, I would imagine in the neighborhood of about 10 percent. That was in 1952, of course, when I graduated.

Q. And despite the fact there were a very few black teachers in that school, the staff was essentially white but you perceived it as a black school, did you not?

A. The general comunity perceived Northern High School at that time as being a black high school.

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Q. Since there is some question about Northern High School and your identification of it because children were being bussed, I believe you testified that the major point was the boundary line between Northern and other white schools. Children were being bussed to Northern, I believe you testified, in Detroit from another suburban school district, an all black suburban district to Northern.

A. Correct.

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[R. I. 465-467, Vol. 5] Q. Now, you were asked a whole list of examples of schools. I think it started with Weaver in 1951-52 with 69 percent black students and a majority white faculty at that school, and you indicated the school would be identifiable as black because of its pupils. I believe the opening question related to a staff situation that I gave you that Weaver and several other schools in the period of 1951 to 1956-57 had the assignment for the first time of black teachers to the schools and that those schools, in fact, were the schools in the Dayton School System that already had the largest number of black children.

A. That's correct.

Q. And to make sure that the precise question is asked in the context of Dayton where the rest of the schools have white faculties and white student bodies, does the assignment of the black teachers to those schools as opposed to other schools with white children in a community accelerate or does it affect the perception of whether or not that school is intended to be a black school?

A. Not at all.

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[R. I. 468, Vol. 5] Q. To make sure we are together on the example, schools that have the largest proportion of black pupils and the other schools have no or have very few black pupils.

A. As a matter of fact, this could well and perhaps does facilitate that school in becoming perceived as being a black school or black area if I might use that term.

Q. But in another context assuming you knew nothing about faculty, these schools would be perceived as black instead of white?

A. Indeed it does have a label of a haven for blacks or one reserved for blacks.

Q. And if in association with that same school and assignment patterns, whites were permitted to transfer out into some

optional areas, does that tend to label this changing school as a black school?

A. Yes, and it facilitates the pattern of segregation.

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[R. I. 469-470, Vol. 5] Q. In a situation where a school because of its student population is perceived as predominantly or essentially all black, if it had had a white faculty at the time that perception was made, you would approve, would you not, adding black teachers to that faculty?

A. I would have to answer that question in the context of the total system, if I might. I would approve of desegregating that faculty, but at the same time I would also approve of desegregating the pupil body composition because in the context of your question adding black teachers to a school with a formerly all-white teaching faculty and a large body of black pupils will lend itself to perceiving that school as being indeed a black one especially when pupil desegregation is not being put into effect.

Q. Although you already indicated the community would make a perception of the school as being a black school when the student composition reaches something in the neighborhood of 67 percent, haven't you?

A. I don't want to play the number game. Again, it would depend upon the racial composition of the city.

Q. Well, I don't want to play any games with you, Dr. Green.

A. Well, I would not focus on necessarily 57 percent or 30 percent or 28 percent whether or not a school is perceived as being a black school or a white school. This must be placed in the context of the proportion of blacks, percentage of blacks, percentage of whites in that particular city.

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G. TESTIMONY OF ROBERT REESE, SR.

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[R. I. 529-533, Vol. 6] Q. How did you get to school?

A. Walked.

Q. You walked across the bridge and the river separates that where you lived and the Central School; does it not?

A. Yes, sir.

Q. You walked across the bridge and got to that school; correct?

A. Yes, sir.

Q. Take your seat.

Did there come a time, Mr. Reese, when someone at the School Board found out that you were attending Central with a false address?

A. Yes, there did.

Q. What happened?

A. Well, they sent us home from school and told us we had to go to Garfield School, my sister and I.

Q. Did you go to Garfield School then?

A. No, I didn't go.

Q. Why didn't you go?

A. Well, my father didn't want us going out there in those frame buildings, so he filed a suit against the Board of Education and kept us out of school one year.

Q. You say out there in the frame buildings, can you tell me what was in the frame buildings?

A. Classrooms were black students and black teachers.

Q. And was there another building on the Garfield site?

A. A brick building with white teachers and white students.

Q. So, your father didn't want you to attend the black segregated classes; is that correct?

A. Yes.

Q. And he filed a lawsuit. Did you subsequently get into the brick building?

A. After they won the suit the following year because he

died the 29th of June in 1925 and in September of 1926 I returned to Garfield in the brick building.

Q. All right. Did they still continue to operate the all-black classes and black faculty in the back of the brick building?

A. Yes, sir.

Q. And were they there after you finished your elementary school at Garfield?

A. When I left and went to Roosevelt, they were still there and still operating.

Q. While you were in the Garfield School, did they have any black classes during subsequent years in the brick building?

Q. After you left the Garfield School, where did you go?

A. Roosevelt.

Q. When you were at the Roosevelt School, did you participate in all school activities?

A. Football.

Q. Did you play freshman football?

A Yes, sir.

Q. Was there any separation of the races in connection with that?

A. Well, we had separate locker rooms, separate showers, and they had what they called the east and west swimming pools, and the white boys swam on one day and black ones swam another day.

Q. You did not swim in the same pool together at all; is that correct?

A. Yes.

Q. Did you leave Roosevelt after that?

A. When Dunbar opened, I left Roosevelt and hightailed it over to Dunbar.

Q. And why did you go to Dunbar?

A. I wanted to be free. I felt more at home at Dunbar than I did at Roosevelt.

Q. Why is that?

A. You couldn't segregate me at Dunbar.

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Q. At Roosevelt, Mr. Reese, the classes that you attended were integrated and had both black and white in them, did they not?

A. Right.

Q. And the football team on which you played had both black and white players on it, did it not?

A. Right.

Q. The practices you indicated as far as the separate locker rooms, showers and pools terminated by 1950, did they not?

A. I wasn't there in 1950.

Q. So, you don't know when they terminated?

A. I don't.

Q. Now, when you were attending Central Elementary School under a false address in the early '20's, you were in mixed black and white student classes there?

A. Yes.

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H. TESTIMONY OF IRVING MOSES.

[R. I. 536-542, Vol. 6] Q. State your full name and occupation, please.

A. My name is Irving Moses. I am principal of the Fairport School in the Dayton School System.

Q. Are you a lifelong resident of Dayton?

A. No, I am not, sir.

Q. When did you first come to Dayton?

A. I first came to Dayton first in 1952. I moved my residence to Dayton in 1954.

Q. When you first came to Dayton did you have any connection with the school system or any contact with them?

A. Yes, I did. I submitted my application for a teaching position.

Q. All right. Did you subsequently obtain a position with the Dayton School System?

A. Yes, I did, in 1955.

Q. Had you been teaching prior to that time?

A. Yes, I had, sir.

Q. What is your degree?

A. Well, when I came to Dayton I had a BS Degree from what is now Kentucky State University and a Master's Degree from Indiana University.

Q. And what particular field had you been teaching in?

A. I had been teaching science.

Q. And that would be for how many years?

A. Four years I believe.

Q. Did you take an examination that was given at that time for principals' positions?

A. It was after I began teaching in the system, yes. I took the examination. I don't remember exactly what year it was. '55 or '56, somewhere along there.

Q. Did you subsequently obtain a position as an assistant principal?

A. Yes. In 1960 I was appointed assistant principal at Westwood School.

I think I was the first assistant principal at Westwood; I believe the second assistant principal in the elementary schools of the City of Dayton.

Q. O. K. You were there in what year? 1960?

A. 1960 – the terms 1960-1961, 1961-1962.

Q. And am I correct that the pupil population of the schools was aproximately 70 percent black at that time?

A. When I left, yes, it was 70 or greater.

Q. What happened to the faculty, the racial composition of the faculty during the period of time you got there, from the time you got there to the time you left?

A. As I remember, I think there was – when I went to Westwood there were – I think I was the fourth person, black person, on the staff there, either the fourth of fifth.

Q. What at the time you left was the situation?

A. Well, quite a few blacks came in that year. As I remember, the first year I was there there was some ladies who returned from maternity leave, and I remember we had some classes in a church. We had three classes I believe in a church and one of the ladies took a first-grade class in a church.

Q. By the time you left what was the racial composition of the faculty? Had there been a change of any substantial nature?

A. I don't remember what percentage it were, but there had been a substantial change.

Q. From white to black?

A. From white to black, yes.

Q. And this was during the time when it was rapidly changing from black to white in population, is that correct?

A. Yes. Yes, it was definitely so.

Q. After you left Westwood, what school did you go to?

A. After I left Westwood I went to MacFarlane. I had to reorganize MacFarlane as an elementary school.

Q. Was this in 1962?

A. This was in 1962, yes. I worked all that summer gratis.

Q. Is this the time that Garfiield and Willard Schools were closed?

A. They had been closed and the pupils at Garfield and Willard or the greater part had been assigned to MacFarlane School. I believe we did get some pupils also from Grace A. Greene and Weaver Schools, too. We had about 1300 children that year.

Q. What about your new faculty at MacFarlane?

A. Well, some of the teachers – most of my staff were the teachers who were reassigned from the two schools that were closed, Garfield and Willard.

Q. I think the statistics indicate that as of 1966 MacFarlane had only one white teacher. Was this a full-time teacher or a specialist of some sort?

A. She was a specialist. She was a reading specialist in the primary grades, Mrs. Velma Vernon.

Q. Did you subsequently get another part time or another specialist white teacher?

A. Yes, another special teacher, Gilbert Unger. He was a band teacher. He came in once or twice a week to instruct the children in band.

Q. All right, did you have any dealings with Mr. Royer?

A. Yes, each year, when we were projecting enrollment and so forth, getting our organization ready for the following year, I would have to set up a conference with him.

Q. Did you have any meetings with Mr. Royer with respect to the question of assigning full-time white teachers to MacFarlane?

A. Oh, yes. This came up and I asked him, I reminded him when I came to Dayton I had very few places to work. My first year, when I first made aplication, he sent me – there was a position open in biology, I think the basketball coaching position was connected with that, and I was sent out to Dunbar High School to talk with the principal about this job. This was the year before I finally got on, and another teacher got the job, incidentally, but –

Q. What do you mean by very few positions open to you?

A. Well, because at that time black people – black teachers and blacks were only hired in a few schools.

Q. Going back to the time of MacFarlane, your meetings with Mr. Royer, did you have any conversation with him with respect to the assignment of full-time white teachers to MacFarlane?

A. Yes, every year – this would happen just about every year. I would ask him why were only black teachers assigned certain schools, and I reminded him when I came to the system I only had, you know, a certain choice, and I asked him why is it that white teachers had a choice.

Well, I told him, I said, "I don't care what color the teacher is as long as she can work with children. It doesn't make any difference to me whether she is white, black, or blue for that

matter, and he said, "Well, the reason we don't assign white teachers to black schools, in the first place, they would quit." And then he went on to say that some of the husbands – the women teachers' husbands didn't want them to work there.

Q. These were black schools?

A. Yes, they had black pupils.

Q. Is there any question about them working under a black principal; is that the problem?

A. Oh, yes. Yes, he definitely said that the teachers, white teachers would not serve under black principals.

Q. You were a principal and you are black; is that right?

A. I think I am. I was a principal.

Q. I don't know what word we use at that point.

Mr. Moses, in 1967 did you have a problem with overcrowding at the McFarlane School?

A. Oh, yes, we were very much over-crowded, and I believe this is the year that we rented space in a church nearby.

Q. That would be the Bethel Church?

A. Bethel Baptist Church, yes. It's on the corner of Summit and Home Avenue.

Q. How about the Tabernacle Church; did you rent space there?

A. Yes, we had rented space in the Tabernacle Church. We had the pre-school program, and I think we had a building adjacent to the tabernacle church. I think we had some classes in the basement, or either one of the annexes there.

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[R. I. 544, Vol. 6] Q. What about Jackson; are you familiar with that?

A. Oh, yes. I forgot Jackson School, yes. Jackson School is built, I believe on the Home Avenue side of Jackson Elementary. It still exists, yes. All these schools were built, I believe, in the '60's.

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Q. Mr. Moses, the only locations in the system were to relieve overcrowding because of heavily populated neighbor-

hoods, two schools were built, one elementary and one primary, were the Louise Troy, Residence Park, Jefferson and Jackson situations; isn't that right?

A. Those are the ones that I am familiar with, because I am in that area. I can't say they were the only ones.

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[R. I. 547, Vol. 6] Q. We unfortunately don't have any way other than by rough estimates by people such as yourself for the racial composition of the student bodies of these schools before 1963 as I understand it. Do you have any percentage figure that you can give us as the composition of the student body?

A. Not being a statistician, I didn't keep any figures like that. I was just an employee of the school. I couldn't give you any exact figures, but I could see there was a change over. The composition did change.

Q. Can you tell us whether the school was more than 50 percent black when you first went there?

A. When I first went there, it was less than 50 percent black.

Q. There had been a number of additions to the Westwood School to take care of overcrowding conditions up through 1954, had there not?

A. I can't answer before 1954. I know when I went there there was some construction in process.

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I. TESTIMONY OF JOHN HAREWOOD.

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[R. I. 565, Vol. 6] Q. Would you state your name, please, sir?

A. John Harewood.

Q. What is your present position with the Dayton Public Schools?

A. Assistant Superintendent in charge of administration.

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Q. During that period of time was the Dunbar High School an all-black high school with an all-black faculty?

A. All black, all the way.

Q. During that period of time did you assist in transporting the athletic teams?

A. Yes, indeed. From '38 until probably '48, that was the first time the basketball team was admitted to the City League, and '49 for the football team. During that period of time, in order to provide the type of experiences which we felt that the students should have, especially athletes, we did everything possible to substitute for the lack in this area, and we used to take our cars and drive them to different places so they could participate in football, scholastic football. We took them to Louisville, Kentucky, to St. Louis, Missouri, to Indianapolis, different places. That was just a contribution we made in order to make up for some deficiencies which we felt were not the type of things that should happen to young people in our public school situation.

[R. I. 570, Vol. 6] Q. During the period from 1943 to '45, did you have a foster daughter in the Dayton Public Schools?

A. Yes.

Q. And where did she attend school?

A. At Wogaman Elementary School.

Q. And during that period of time was there any change

in the pupil composition and racial composition of the black faculty and pupils?

A. Not '43. Did you say '43?

Q. '43 to '45.

A. No, not during that time, no.

Q. And was there shortly thereafter?

A. Yes. In 1945, when they appointed a black principal there, then there was a change.

Q. And what happened?

A. At the end of the spring – end of spring session they had an all white faculty and they appointed a black principal. In the fall they had a black principal and an entire black faculty there, black student body.

Q. Were there white children still living in the Wogaman attendance area?

A. There were.

Q. They did not attend the Wogaman School?

A. They did not.

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[R. I. 573-574, Vol. 6] Q. In other elementary schools were there black children at that time with some of the children going to Roosevelt and some going to Dunbar at the high school level?

A. Some of the black children, yes.

Q. And was there any selection process of channeling of these children?

A. We as counsellors visited all these feeder schools, we call them, to take over high school course selection to supposedly all the children in the 8th grade to give them the benefit of our experience as high school people, to indicate to them how high school election blanks should be filled out, the type of courses they should take and so forth. And interestingly enough, in my visits to some of the schools, in some of the schools I got to talk to all the children. And, so, after the first year that was corrected, after somebody made some complaints about it, and only a few children were selected. We

were only allowed to talk to those few children who had been selected, by some means I don't know what, children who were going to Dunbar High School.

Q. And that would not include all the black children?

A. No, it would not.

Q. Were you ever invited to discuss a promotion to a principalship?

A. Yes. In 1949 I believe I was requested to come to discuss the opening at Willard Elementary School to see if I was interested in becoming a principal there. I discussed that with the members at the Central Office staff.

Q. What was the racial composition at Willard?

A. Black.

Q. And the faculty composition?

A. Black.

Q. And did you accept that job?

A. No, I did not.

Q. Why not?

A. First of all, my training was in high school. I felt that I had ability to work in a high school situation. I felt that my relationship with high school students was such that I could make a contribution there.

So I thanked them for their invitation and told them I felt my contribution was in high school so I did not accept that position.

Q. Did you later apply for a principal position?

A. Yes, in 1954 I applied for the position of principal of Wogaman Elementary School.

Q. And what was the racial composition of Wogaman School in terms of pupils and faculty?

A. Black.

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[R. I. 576, Vol. 6] That was the only alternative I had in a segregated system, as was said to me, that there was no – even though I was qualified and they said I was qualified,

they would pick others with less experience, with less qualifications than I and appoint them to positions, that either I accept no promotion or I take something else, and that's the reason that I went down and applied for the position at Wogaman School.

Q. And in what year was that?

A. 1954.

Q. And did you receive that position?

A. I did.

Q. And how long did you remain principal of the Wogaman School?

A. Thirteen years.

Q. And during that period of time could you give me the composition of both the pupils and the faculty?

A. The pupil population was all black. I had one white teacher appointed to my staff in 1965 in special education.

I had two or three or four, I don't remember the number of teachers in special subject areas who were there for semester assignment in practical arts, and a music teacher who was there – in instrumental music who was there

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[R. I. 579-580, Vol. 6] He showed me a stack of applications that were all black. There were some with Master's Degrees, wives of people who worked at the Air Force Base and others, and we looked through those and we would comment what fine applicants they were, and the tragedy was that out of that many I needed one or two, and they were just there, yes.

Q. Separate pile of black applications?

A. Yes, that's right.

Q. Did your school ever have tuition pupils?

A. Yes.

Q. Could you explain for the Court what that means.

A. Pupils who live out of the Dayton School District who by paying a fee which is stipulated by the Board of Education could enroll in a particular school in any particular class

if there was room in that school or class for them. And if they made arrangements through the Pupil Personnel Department for enrolling in the school, then they could become tuition pupils there.

Q. They had to be approved at the Central office?

A. Yes, that's right.

Q. And during what periods of time, and give me roughly what number of pupils and the race of those pupils who attended your school on a tuition basis?

A. Pupils, they were all black, tuition pupils who attended. I can't give you specific numbers but in one of the years, probably '63 or '64, I happened to be in conversation with the personnel in charge of collecting the payment for them in the Clerk Treasurer's office. They indicated to me that we had a larger number of tuition pupils than any other school in the city.

Q. And no white tuition pupils came to your school?

A. No white, no.

Q. In the 1966 school year were you considered for a promotion?

A. Yes.

Q. And what was that?

A. I was first – considered may not be the word. Robert French, who was Superintendent of Schools, was chatting with me informally and saying that the pressure was on them to integrate the Central Office staff. He asked me would I be interested.

I thanked him very politely, said no, because I didn't want to receive an appointment just because of race or take a token assignment. That was the end of the conversation.

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[R. I. 582, Vol. 6] He asked me was I interested.

I said on those conditions, that's a position that my qualifications made me eligible for, then I would accept the position if it was offered to me, and under those conditions I was then

appointed as Director of Secondary Instruction Curriculum for the Dayton Public School System.

Q. During the period of that appointment did one of the schools in the system have a fire?

A. Yes. Edison School had a fire during the time I was serving as Director of Secondary Instruction Curriculum. Yes, sir.

Q. What did you do? How did you decide to take care of pupils in the spaces that had burned down?

A. The decision was not mine. I did not sit on the Executive Committee at that time. I was called in because of the problem we faced in reference to housing black children because of the fire.

At the meeting there was brought in from the Business Department a list of rooms in churches in the neighborhood of the Edison School, and they were trying to decide the best method for housing the children in the schools because the fire had been held.

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[R. I. 583-584 Vol. 6] Q. When those children were transported, where were they assigned within those schools?

A. I don't remember all the schools to which they were assigned, but one thing which was disturbing was the fact that in some school situations they were transported as a class with the teacher and came into the new school not as a part of the new school but still maintained their same identity as a class in the school to which they were assigned.

Q. In other words, there would be totally black-contained units in white schools?

A. That's right.

Q. Were you consulted on that decision?

A. No, that was not my decision.

Q. In view of your experience, your present experience, and your years of experience with both elementary and secondary education, was that decision to segregate those children educationally justifiable?

MR. GREER: Objection, your Honor.

THE COURT: Sustained.

MR. DIAMOND: Your Honor, I believe that Mr. Harewood has testified that he has been with the school system some 35 years; that he now is the Chairman of Administration —

THE COURT: Mr. Diamond, you have had testimony as to what occurred. These classes were transported into literally a black enclave, and that is what I am concerned with.

Whether there were the best of reasons or the worst of reasons, or no reasons at all, we wind up with that fact, and that so far as I am concerned, is all the Court is considering at this time.

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[R. I. 586-587, Vol. 6] Q. Earlier had there been another school fire?

A. Yes.

Q. About what period of time?

A. 1963, I believe, Ruskin School.

Q. What was the predominant racial characteristic of the Ruskin School?

A. White.

Q. When that school or spaces therein were shot by the fire, in what manner were those pupils assigned?

A. Similarly.

Q. When you say similarly, this time they are white pupils?

A. Yes, but they were assigned with a teacher in some of the other schools to which they were assigned, speaking specifically of Central School, I remember that situation.

Q. At the Central School they would be in separate classes?

A. Yes.

Q. What was the racial composition of the Central School?

A. It was white and black. I don't know the exact percentage.

Q. In other words, it was a mixed school of some sort?

A. Yes.

Q. How long did you remain as the Director?

A. Two years.

Q. When did the policy end of segregating the pupils from the Edison School in other schools?

A. Let's see. Dr. Carle came as a superintendent and one of his instructions to all of us was to make sure that principals in the schools sent in to us their plan for integrating Edison pupils into the regular staff, and that was to be submitted to us before school began that next year.

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[R. I. 590-592, Vol. 6] A. I refer specifically to the desegration of the staff which has occurred and the alternatives and my recommendations in regard to it.

BY MR. DIAMOND:

Q. Then, with respect to pupils as well?

A. Yes. I had a very strong feeling, and I indicated it to teachers and principals, to others who would listen that any desegregation of staff was not addressing the real problem of segregation of pupils which exist in the Dayton Public Schools.

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THE COURT: Whatever he recommended I am interested in hearing. What his thoughts were and his reasons I am not interested in hearing in this • • •

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Q. The Edison School, was it reconstructed after it burned?

A. Yes.

Q. And when the Edison School reopened, what was the racial composition?

A. All black.

Q. And what alternatives were considered to reopening the Edison School as an all black school?

A. The alternatives was to make it an early childhood center.

Q. And what would have been the racial composition of the Edison School as an early childhood center?

A. Black and white, but I don't know about the ratio because it would depend on how many children would attend.

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[R. I. 595-600, Vol. 6] Q. Mr. Harewood, let me make it clear that I want you to sort of list the alternatives and, if you will, I will ask you something further about them.

A. The alternatives that were considered and discussed in Executive Council and recommended by me in the discussion, were such things as pairing schools, magnet schools, looking again at the available classrooms in some schools, and since the responsibility for pupil assignment and teacher assignment was inherent in the superintendent's responsibilities, to look again and see if the assignment could be made that would bring about integration of some of the students in the schools. Also —

Q. Go ahead. I am sorry. I didn't mean to interrupt you.

A. Also in the general discussion we mentioned the fact that teacher desegregation should always be accompanied by pupil desegregation if we are going to address the problems which face us because of the segregation of pupils.

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Q. Mr. Harewood, since the HEW office had directed or had found that the system was in non-compliance with Title 6 of the Civil Rights Act of 1964, and the school system was about to commence a faculty plan of desegregation, what recommendation, if any, did you make with respect to timing of pupil desegregation?

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Yes. The recommendation which we made in reference to that act was that if it could not happen simultaneously with teacher desegregation, that as soon as possible after that pupils should be desegregated in order to address the problem which faces us.

Q. You say "address the problem which faces us." What problem are you speaking of at this point? I want to make sure I understand.

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A. The problem that the Dayton Public School faces because of the segregation of the pupils in the school.

Q. All right. You recommended that they proceed — the pupil and faculty desegregation proceed simultaneously, if possible, or if not, shortly thereafter?

A. Yes.

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Q. You understand, Mr. Harewood, I am not asking you to tell me what is right or wrong about segregation, but I am asking you to deal with mechanics if you will. That is probably an unfortunate word. Will you try and answer the question in that context?

A Mechanics?

Q. What was the object of the faculty decision? What was the goal to be accomplished in a narrow sense, if you will?

A. So that we would no longer have schools which are identifiable by race because of the composition of the student population or the faculty population or the administrative assignments.

Q. Well, did your recommendation that the time be simultaneous based upon an evaluation as an administrator or whether or not this could be accomplished solely with faculty desegregation?

A. Yes.

Q. Did you think it could be accomplished solely by the faculty desegregation?

A. No.

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THE COURT: Mr. Harewood, do I understand what you are saying is that assume that a school had a completely integrated faculty but totally or race or the other as students, it would still be a racial identifiable school?

THE WITNESS: Yes.

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[R. I. 604, Vol. 6] Q. Now, the resolution which you have in your hand, and particularly Step 2 as it is set forth there, would that have had the effect of doing what you had originally recommended in terms of pupil assignment in the Dayton School System?

A. Yes.

Q. I am sorry, I didn't hear you.

A. This resolution would have, yes.

Q. All right. And the resolution adopted in January, what effect did it have in terms of pupil assignment?

A. It restored the original boundaries which was not in line with the recommendation.

Q. And what does that do in terms to pupil attendance in the public schools in Dayton by restoring the original boundaries?

A. It resegregates them to the original condition which existed before this. We have black schools, we have white schools; schools in lower economic areas, and some in the other areas.

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[R. I. 608-609, Vol. 6] Q. Now, to go back to just a few points in your testimony, I understand that you were at Dunbar from 1938 to 1954; is that correct?

A. Yes.

Q. It was during the period from 1943 to 1948 that Dunbar became integrated into the City Athletic System; is that not correct?

A. 1948 and '49, they became, those two years.

Q. Didn't they start with training in '43, or do you remember?

A. Probably, yes, sir. I was speaking of the major sports. There may have been some activity in sports, yes, sir.

Q. But the two major sports are, of course, basketball and football in Dayton; aren't they?

A. That's right.

Q. In 1948 Dunbar became completely integrated into the City Basketball Leagues?

A. Yes, that's right.

Q. Then the following fall it became completely integrated in the City Football Leagues?

A. That's correct.

Q. And that has been the situation ever since; has it not?

A. That's right.

Q. You indicated that as a counselor at Dunbar from 1949 through 1954 you visited the area schools that would potentially feed children to the Dunbar High School?

A. Correct.

Q. In those days, and up to 1962 I think it was, Dunbar was an optional school; was it not?

A. Yes, sir.

Q. In other words, a child anywhere in the City System could elect to go either to the high school in his neighborhood or could elect to go to Dunbar?

A. Yes.

Q. The only other school with a city-wide attendance district at that time was Patterson High School; wasn't it?

A. Yes.

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[R. I. 611, Vol. 6] Q. The children who had been in class during that school year up until the time the school year burned down were transferred with the schools intact to these various predominantly white schools?

A. Yes.

Q. Then it was the start of the school year the following fall when those students became integrated into the other classes existing at those white schools; isn't that right?

A. In some instances some of them did it right away. Some waited. Some didn't do it until the next fall.

Q. How much time was left to complete the school year class that those children had with their teachers at Edison when the Edison School burned down?

A. I am not sure of the exact date, Mr. Greer, and the year when that happened.

Q. It was sometime in the spring?

A. In the spring, yes.

Q. Wasn't it a month or two before school was due to let out?

A. That's right.

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[R. I. 778-780, Vol. 7]

(Thereupon, the following proffer was made into the record by Mr. Diamond out of the presence of the Court:)

Mr. John Harewood, if permitted to answer whether it was educationally justifiable to segregate the children from the Edison School for the last six weeks of school to white schools would have testified as follows: From his experience as an elementary principal, second curriculum coordinator and second local chief administrative officer of the school system, would have testified that there was no educationally justifiable reason for segregating these children in the classes intact with their black teachers in otherwise virtually all-white schools.

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If permitted to testify with respect to the reasons for his recommendations with respect to faculty and pupil desegregation, Mr. Harewood would have testified as follows: First, the

faculty and pupils should be desegregated simultaneously or in as close coincidence as possible.

Second, that from his experience with the patterns of segregation and discrimination directly resulting from and being opposed by the Dayton Public School System and its accommodation of the white community's hostility to association with blacks on an equal basis, that when pupil desegregation was not made part of faculty desegration it was a symbol of the fact that the white community was still hostile to and unwilling to accept pupil desegregation.

If permitted to testify to the reasons for the January 3rd, 1972 action of the Board in reimposing segregation and redrawing every boundary in the school system which had the effect of establishing the substantial duality in pupil populations on a racial basis that is now present, Mr. Harewood would have testified that such action was merely the most overt act of discrimination and segregation by School Board action; and further would have testified that such overt act was necessitated because of the Board's decision on December 8, 1971 for the first time to come to grips with its own responsibilities to eradicate the patterns of discrimination and segregation which it had caused in substantial part for the past 50 years.

Mr. Harewood further would have testified that faculty desegregation given the history of identification of schools as black or white, and intentional tailoring of schools to serve white pupils or black pupils by the racial pattern in faculty assignment would not disestablish the racially dual system of education imposed by public school authorities.

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J. TESTIMONY OF ELLA LOWREY.

[R. I. 620-631, Vol. 6] Q. And where did you teach?

A. Garfield Elementary and Wogaman Elementary.

Q. All right. While you were a student in the system, did you become familiar with the Garfield Elementary School?

A. No, I did not.

Q. When did you first become aware of the Garfield Elementary School?

A. When I met Miss Louise Troy who was teaching there.

Q. And do you know under what circumstances she was teaching physically? Was it in the main building or elsewhere?

A. I knew she was teaching a class of first and second grade black children in the brick building right at the rear door in a classroom there.

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Q. Can you give me the approximate date?

A. Well, I would say this was just before the flood years.

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About 1912 or 13.

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Q. And she was teaching in an all black class and Mrs. Troy is black?

A. Yes.

Q. In the brick building at that time?

A. Yes.

Q. Do you know what happened to that class thereafter?

A. I lost track of what she was doing because I finished high school and started going to Dayton Teachers Normal and I lost track of her until I finished Dayton Teachers Normal and went to teach myself.

Q. That was in 1918?

A. Yes.

Q. And when you went to teach Garfield, where were the black students being taught?

A. In a two-story frame building with four rooms that

was a converted four-room house, two rooms down, two up with a stairway in the center.

Q. Were there any black students in the brick Building?

A. Not at that time.

Q. And were the teachers as well as the students black in the frame building?

A. All of us were black.

Q. Can you tell me what happened in the way of growth of for want of a better term I will call it the black annex to the Garfield School? Did you have an increase in enrollment during this period of time you were teaching?

A. When I went to do my practice teaching there where all the black Normal School girls went, there were four classrooms, a first and second grade in one room, third and fourth in one room, fifth and sixth in one room, seventh and eighth in one room. The classes were very large running about 50 children.

Q. Is that 50 children to one teacher?

A. To one classroom and one teacher. The next year, in 1918, that summer, they put up a two-room portable frame building with big stoves in it to heat them and I was hired along with another young woman to take a single second and third grade. I had third. The other girl had second, and this relieved the double classes in one room.

Q. Now, you taught –

A. At that point in time, that made six black teachers with six black classrooms.

Q. You were teaching in the portable portion of the building; it that correct?

A. Yes. The brick building sat here (indicating), here was the big yard (indicating), here sat this house (indicating), and on the other side of that was the frame, the two-room frame building.

Q. Were your classes large at that time?

A. At that time, when I began, I think I must have had about 25 or 30 children.

Q. Did there come another expansion in enrollment of children in the annex?

A. Yes, and it happened very fast. I would say it was due to the fact that after the flood, blacks moved out of the inner city proper, as we term it now, going west to go up high out of the flood territory where we had had the flood, and they were moving fast into the west side, further west.

Q. Was there another addition built to this annex?

A. We stayed in this small frame, I can't tell you how many years, but being very fragile, the building being very fragile, it was soon delapidated, in bad condition. The walls were bad; the windows were bad and broken out, and the heating unit became bad.

Then they build what I would call a permanent building directly behind this frame house. I say permanent because the floors were concrete, there were toilets in the basement; furnaces in the basement, an iron stairway to come up from the outside into the building. That was for four rooms.

Then the two-room portable was torn down. At that point in time then we had eight black classrooms with eight black teachers.

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Q. You say '21 and '22, you mean the years?

A. Yes, and at that same time the white teacher in the brick building with all white children had 20 children and I had 42. There was no effort made to equalize our classes. I kept 42 and she kept 20.

Q. Were you there in 1927 at the time the Reese case was filed?

A. Yes, I was.

Q. You were teaching still in the annex or the wooden building; is that correct?

A. Yes, I was, and Mr. Reese didn't like this thing, and he said he would not send his children there. They would not permit his children to go into the brick building, and he said he would not send them across the river to Central

School. He would sue the School Board first, and he kept his children at home.

Now the School Board at that time, not knowing what was going to happen, hired we eight people on a day-to-day substitute basis in September.

Q. You say eight people?

A. Eight teachers. There were eight black teachers of black classes.

Q. Where did they hire you as substitutes? You had been hired previously?

A. Yes.

Q. Where were you hired as substitutes on a day-to-day basis?

A. They told us that they didn't know whether we would be there after the case was settled or not. If the case was settled and they had to admit black children to the white classes in the brick building, then there would be no reason for us to be there, we were told.

Q. You would not be permitted then to teach the white children?

A. No. This is what we were told.

Q. The case was finally disposed of. Were you then given contracts?

A. We were given contracts and given the retroactive pay that we lost from September until December.

Q. Did you know what happened to Mr. Reese's son?

A. He came on to school and went to the classes in the brick building.

Q. How did the black children get into the brick building after that?

A. They had to go to the administration building, the parents had to go and make a special request that their child be admitted to this brick building, and a little later in time, shortly after that went on for a while, people objected so to it, then they were permitted to bring their child to Garfield School and asked permission to have their child entered in the brick building, but the parents had to come into it.

Q. And ask the principal?

A. They had to ask the principal, "Place my child. I want my child placed in the brick building."

They had to come and so specify.

Q. If they did not do that, and they lived in the Garfield zone, they would have been assigned to the black annex; is that correct?

A. They were assigned to the black teachers in the black annex and the black classes.

Q. Did the black population continue to grow and did in turn the number of white pupils available in that area decrease?

A. There came a time in the late '20's when we just had more children than we could handle and the weight seemed to be in the fifth and sixth grade area. At that time one black teacher was hired and she was given a room right at the rear door of the brick building. She was the first black teacher to work in the brick building at this time.

Q. Other than Mrs. Troy?

A. Mrs. Troy, in the meantime, was over in the frame building with us. Now that was in, I would say, about '27 or '28, this was, and then at the time of the depression in '32 —

Q. Excuse me. Let me interrupt you. This black teacher by the back door, was she teaching an all-black class?

A. An all-black class of fifth and sixth grade children.

Q. All right.

A. Then that was the only teacher for the black children in that buildinng up until the time during the depresson when married women teachers whose husbands could support them had to go home, and I was one of those that went home in '31 and '32. When I went back in '32 and '33 there was no place for me. We had had somewhat of a disturbance about these people being let out, and we were all assigned back to work. There was no place for me, because by that time another teacher had my class.

Q. Another black teacher?

A. Another black teacher had my class, and they had been told – the Board had been told – assign all those teachers.

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The Board of Education then said that I would – well, now, how do I say that – we had a court case out of it, and the mandate was, "Retire these teachers."

Wouldn't that be to the Board?

Q. Go right ahead.

A. Where was I before I was so rudely interrupted?

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So then we went back to work. That's always been a sore spot with me, my being let out that one year, interrupting my service, you know – so when I went back to work there had to be a place made for me, so to speak, so then 18 children who were slow, troublesome, worrisome, bothersome, generally disliked, were called from their groups and given to me in an ungraded class. There was no place to put me excepting in the brick building in a room that had formerly been the principal's office, a little cubbyhole upstairs, and this mixed black fifth and sixth grade and my black class upstairs were the only two black classes in the building.

Q. Let me just make it clear. When you say mixed, you mean mixed grades, not mixed pupils?

A. Yes, I do. No. No. No. No. No. These were all black children, and I had about 18 of these in this little room upstairs in the building. All the rest of the building was white excepting we two black teachers and these two classes of black children.

This continued until about, as I remember now I was in that room about two years, which would make it about '34 or '35. We had two little white children left in the building. Now these ten white teachers were maintained through all of this, and then as our classes became overflowing with black children, they were placed in the white teachers' rooms, but not until there was no place for the child to sit in the room.

Then when there were only two little white children left in the building, the white teachers were all reassigned. The black teachers were put in these rooms. We had at that point in time eight and ten – eight and two, that was ten – and six white teachers remaining in the building at this time now teaching whites, a few whites, three and four in a classroom, and all the rest of their children were black.

Then, as soon as there were only two whites left, there were black teachers assigned to these rooms, and a black principal was assigned, and that was about '35, as I recall.

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[R. I. 635, Vol. 6] A. Then I resigned. Then I was out of the system six years, and then I went back and continued on until 1953. When I went back I went to Wogaman School and I stayed there twelve more years doing 40 years service in all in Dayton, and I never taught a black child in all – pardon me. I never taught a white child in all that time. I was always in black schools, black children, with black teachers.

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K. TESTIMONY OF MARTIN E. SLOAN.

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[R. I. 667-670, Vol. 7] A. Yes, sir. This is the 1971 annual report of the President as required by the 1968 Housing and Urban Development Act. At page 26 the President states, "Residential separation of minorities was and is another characteristic of the social environment which has been influenced by Federal Housing Policy. Until 1949 FHA officially sanctioned and perpetuated community patterns of residential separation based on race by refusing to insure mortgages in neighborhoods not racially homogeneous. The effects of this policy have persisted for many years after its reversal and are still evident in metropolitan areas today."

Q. Mr. Sloan, directing your attention to – coming back to the FHA multi-family program, the public housing pro-

gram, does it require any certification before a project may be built or expanded from the local school agency?

A. Yes. It is among the requirements by the Federal Public Housing Authority –

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A. Among the conditions which are required by the Federal Public Housing Authority is an assurance that there are or will be school facilities adequate to accommodate the children who will be living in the public housing project, and this is a condition before approval is given. And one way that this assurance is given is through a letter or certification from the local educational agency.

Q. If such a certification is not made in some form or fashion can the project be built?

A. No, it cannot. Federal approval will be withheld.

Q. Mr. Sloan, let me give you a hypothetical – what may be a hypothetical situation. Assume a proposal is made to build a Federal Housing Project in a period of time when the agency did require segregation in the housing – that it true, it did require that, the Federal Public Housing Authority?

A. Yes. Many localities did require it.

Q. All right. Assume the proposal is to locate a public housing project with that given, that it will be segregated in an area that is on that map red, and therefore predominantly black, if the school authority refuses to provide school space in that area on any ground, it cannot be built, is that correct?

A. That is correct.

MR. GREER: I will object, your Honor. This isn't laid with any premise in the Dayton School System.

THE COURT: Objection overruled, Mr. Greer.

Q. Now, assume the School Board advised the housing agency that we will not build or add onto school space in this area because your policy is one of segregation and that will result in, because of the racial composition of the area, an all-black school; however, if you build it in an area where

there are white children, white residents, then we will provide school space regardless of what your tenant selection policy may or may not be, could the project then be built only in the area where the school space could be provided?

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A. That would be right. So far as the Federal Public Housing Authority is concerned, so long as there are going to be adequate school facilities which will accommodate the children, that is the locationn they will approve.

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[R. I. 672, Vol. 7] Q. Now, I take it, Mr. Sloan, that from your limited understanding, the school authority cannot tell the housing authority what their tenant assignment policies should or should not be, is that correct?

A. As far as the Federal –

MR. GREER: I will keep my continuing objection to all this questioning.

THE COURT: I assumed that, Mr. Greer.

A. As far as the Federal Public Housing Authority's position is concerned, until 1962 the kind of tenant assignment policy adopted by local public housing authority was entirely up to the local public housing authority. Whether it wanted to adopt a segregated tenant assignment policy or an integrated tenant assignment policy was entirely a matter for local decision.

Q. As far as you know, the school authorities could not dictate the tenant selection?

A. As far as I know, the school authorities could not.

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[R. I. 674-688, Vol. 7] Q. Mr. Sloan, just to make it perfectly clear, may a Federally assisted, through the local housing agency, project be built if the school authorities decline to provide the school space?

A. No, they may not. Unless the Federal Public Housing Authority can receive assurance that there will be school facilities to accommodate the children who are living in the project, they cannot approve construction of that project. And if the school – local education agency does not give that assurance for whatever reason, then the project cannot be built.

Q. All right. Mr. Sloan, turning from public housing to Federally assisted multi-family housing, do you know whether or not similar assurances are required under those programs?

A. Yes. Similar assurances are required with respect to FHA assisted multi-family housing, subsidized housing for low to moderate income families.

I believe, but I am not absolutely sure, that similar assurances also are required for non-subsidized FHA assisted multi-family housing.

Q. To your knowledge, is any formal certification required for single-family assisted housing?

A. I am not sure, Mr. Lucas.

Q. But the underwriting criteria indicate evaluation of that, is that correct?

A. Yes. The adequacy of schools always has been and still is an important consideration that goes into the decision to approve or not to approve FHA assisted housing.

Q. As part of your agency's function to conduct hearings as charged by Congress, official records are kept, is that correct?

A. That is correct.

Q. All right. Has the agency conducted hearings at which the Secretary of Housing and Urban Development has testified in recent years?

A. Yes. In June 1971 we held three days of hearings in Washington, D.C., and among the witnesses was Secretary Romney of the Department of Housing and Urban Development.

Q. Are these proceedings recorded and records kept and maintained in the ordinary course of business of the agency?

A. Yes, they are.

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Q. Without any detail, except as the cross-examination may require, Mr. Sloan, would you refer to the hearings in which Secretary Romney testified?

A. This is –

Q. I am sorry, and indicate, first of all, the date and so forth of the hearings, and would you particularly reference any testimony by the Secretary to the Commission with respect to the present-day existence or non-existence of a dual housing policy?

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A. This is a copy of the hearing transcript, at which sworn testimony was taken from all witnesses. The hearings were held between June 14th and June 17th, 1971, and Secretary Romney was one of the witnesses, and the hearings were concerned with problems of denials of equal housing opportunity, which is why Secretary Romney was an important witness.

In one point in response to a question as to whether there still existed a racially dual housing market, Secretary Romney replied, and this is from page 244 of the hearing transcript, replied, "You don't have to prove through me that we have got a dual housing situation in the country. We have got a dual housing situation. We have got dual housing markets in practically every metropolitan area in the country."

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Q. Mr. Sloan, has your agency as part of its responsibility conducted studies of the various Federal statutes and Presidential orders which involved an attempt to eliminate this dual housing market?

A. Yes, we have.

Q. And this was an official study as part of the mandated duties of the agency, is that correct?

A. We have done a number of studies along that line. One a particular which we conducted in October, 1970, perhaps that is the one you are referring to, was entitled "The Federal Civil Rights Enforcement Effort," in which we evaluated the Civil Rights activities of more than 40 Federal departments and

agencies, and one entire chapter was devoted to the Department of Housing and Urban Development and other agencies having fair housing responsibilities. And since that report, which was published in October of 1970, we have done two follow-up reports to try to trace any progress that has been made in strengthening civil rights performance, and particularly in the area of housing.

Q. Did the Commission draw any conclusions as to the effectiveness or lack of effectiveness of those programs and statutes?

A. The Commission's conclusion was that the Fair Housing Laws were not being enforced with any strength; that the Department of Housing and Urban Development was relying for the most part on receipt of complaints as its principal mechanism for enforcing the Federal Fair Housing Law rather than taking affirmative action such as the performance of civil rights compliance reviews to determine for itself whether the law was being obeyed.

Q. One final question, Mr. Sloan. From your experience and your study of this field beginning with national banks and Comptroller of the Currency's office and assuming perfect enforcement of the statutory provisions and executive orders, do you have an opinion, sir, as to – let me ask you a preliminary question.

What is the rate of change generally considered in terms of housing, in terms of families moving in and out?

A. The best estimate that I have is that on the average families turn over houses, move from one house to another or one unit to another every seven years.

Q. All right. And do you have – I will get to my main question – an opinion as to how long it would take, assuming this perfect enforcement, to come to some sort of random distribution of the population in terms of race in the community?

A. My best estimate, and it is not a very optimistic one, is that it would be at least three and probably four generations before we could expect even with strong and perfect enforcement of existing fair housing laws, we could expect the kind of random distribution that you are talking about.

Q. Mr. Sloan, I show you a document dated June 8, 1971, entitled "Federal Policy and Equal Housing Opportunity. Are you the author of that document, sir?

A. Yes, I am.

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THE COURT: I am going to permit this to be offered as an item of evidence, Mr. Lucas, and we will give this a number. Your last number I think was 158. This will be Plaintiffs' Exhibit 159.

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Q. Mr. Sloan in what field of English literature was it that you had your education?

A. Elizabethan drama was my major.

Q. The material that I have just been handed marked Plaintiffs' Exhibit 159 purports to be an article which you wrote on June 8, 1971, is that correct?

A. It was a paper I prepared in specific connection with the Commission's hearing in Washington that I referred to earlier and was entered into the record.

Q. All right. Prior to examining you, I haven't had any opportunity at all to read or review this document. Is there anything of significance in it other than what you have already testified to?

A. I am not sure. It tries to trace succinctly key developments in Federal policy relating to equal housing opportunity. There are matters discussed in there that were not gone into in my testimony such as policies of Federal financial regulatory agencies and the mortgage lending institutions which they regulate, which we did not go into.

There is also discussion of several substantive housing programs which I didn't go into in my testimony.

Q. It contains no discussion I trust of the Dayton School Board, does it?

A. No, nothing specifically relating to Dayton.

Q. Does it contain any discussion of any School Board?

A. No, it does not.

Q. Have you ever been to Dayton?

A. Yes, I have.

Q. When and for how long?

A. Well, just a day, many, many years ago, while I was attending Ohio State University we traveled to Dayton.

Q. You came down to hear a jazz band or somthing?

A. Something like that.

Q. You haven't made any study in the Dayton area, have you?

A. No, sir, I haven't.

Q. I don't understand your testimony as to the question of assurances by local school boards that there will be school facilities available. Now, I thought I heard you say at one point in your direct examination that many localities did require this at one time?

A. Did require what?

Q. That the FHA be given assurance that school facilities would be made available?

A. Discussing the public housing program, the Federal Public Housing Authority, among the conditions which it requires to be satisfied before approval of any project, is that there will be assurance that there will be adequate school facilities to accommodate the children who will be living in that project. And in public housing the way in which that assurance is given is through a letter or certification by the local educational agency. Unless that assurance is given approval will not be given. That is so with respect to the Public Housing Program.

Q. Is it ever done informally or is there always a letter of assurance?

A. To my knowledge, there is always a written document giving that assurance.

Q. You don't know in particular of the practice that the FHA followed in the City of Dayton, do you?

A. FHA or the public housing? You are talking about two different programs.

Q. Any public housing?

A. I don't know about the specific practice in Dayton, but I do know about the practice which was required on a nationwide basis, and I can't see why it would be different in Dayton unless there is some particular reason why it would be a different practice in Dayton.

Q. Well, you haven't seen my documents or letters indicating the Board of Education of Dayton certified that there would be facilities available for this or that project, have you?

A. No, I haven't.

Q. Is the assurance to which you are referring not something required by FHA or the VA?

A. No. With respect to FHA, the same assurance is required, that is, that both the Federal Housing Administration and the Public Housing Administration of HUD, both are very concerned about the adequacy of school facilities to accommodate the children who will be living in these projects which they assist in financing, so the assurance is the same.

Now, when Mr. Lucas asked me, I said I wasn't sure whether the same assurance is required with respect to FHA assisted single-family housing. I would be surprised if it was not, but I am just not sure.

Q. Do you know where there are some localities where this asurance has been obtained simply by the people from FHA or the Public Housing Authority inspecting the area and finding out for themselves that there are school facilities available?

A. No, I don't.

Q. You don't know whether that might or might not be the practice?

A. I don't know with respect to FHA. It may be, but the typical plan in FHA was to receive insurance in the form of a letter, a written document.

Q. And over what period are you referring to?

A. The entire period of the operation of the program including to date.

Q. Right up until the present time?

A. Yes.

Q. It is your testimony however, is it not, that the school board or in your experience you have never found a situation where the school board had a choice in either the location or the tenant policy of any public housing project?

A. I don't know one way or the other. The Federal concern was in getting that written insurance and once it was obtained as to the relationship to the local education agency and the local public housing authority, that was something in which the Federal Public Housing Authority did not get itself involved. As to whether in a particular situation the local education agency could or could not say yes or no, the interest to the Federal Government was in getting that insurance and until it got it, no approval would be given.

Q. And all the Federal Government wanted to be assured of was that any child residing in a proposed housing project would have an opportunity to get an education; isn't that right?

A. That's right.

Q. Are you familiar with the Ohio Statute which provides that schools will be placed at such places as will be most convenient for the attendance of the largest number of students?

A. I wasn't until His Honor read that section of it.

Q. You are a lawyer from New York rather than from Ohio?

A. That's right.

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Q. To make sure there is no confusion, Mr. Sloan, you mentioned something about a local option. That option from the Public Housing Agency, it dealt with the question of tenant assignment; isn't that correct?

A. That's right.

Q. And not with whether or not it would be allowed?

A. That's right.

THE COURT: I have one or two questions, Mr. Sloan. Do you know of any example in any city where a school Board refused to grant such a certificate because of the segregation policies of the housing agency?

A. No, Your Honor, I don't, but neither the Commission nor I personally has ever actually inquired into that specific question. I would like to.

THE COURT: There is no evidence to your knowledge that any school board has ever done that; is that right?

THE WITNESS: Your Honor, I don't know of any such situation, but then it would be difficult for me to know.

THE COURT: Your inquiry into this issue has not included that determination?

THE WITNESS: That's right, sir.

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L. TESTIMONY OF HERBERT CARROLL.

[R. I. 695-696, Vol. 7] Q. And what has been the policy with respect to the student during this whole period who was attending another school for racial purposes, if you will, who had a disciplinary problem? What was the policy with respect to that student?

A. The policy was that he was to return to his own school.

Q. If he had a problem, say, at Meadowdale and his home school was Roosevelt, then he would be sent back to the black school program; is that correct?

A. That's correct.

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[R. I. 700-704, Vol. 7] A. Yes, it does.

Q. In terms of your curriculum?

A. It does.

Q. Do you know, or from your observation of the applications, is there a pattern of particular schools that white chil-

dren are applying for curricular transfers from, and is there any pattern to the schools they seek to attend?

A. Yes. Basically in most Roth High School – let me be more specific. Particularly the white youngsters in Roth High School are seeking Meadowdale and Stivers Schools for latin and power mechanics. That seems to be the reason why they want to leave.

THE COURT: Excuse me. Which high school are they seeking to leave?

THE WITNESS: They are seeking to leave Roth High School, Your Honor.

Q. Roth, Meadowvale and Stivers; is that correct?

A. Yes.

Q. What about from Roosevelt; are there any transfers from Roosevelt?

A. Yes. Basically the transfers – you are talking about black students now?

Q. I am talking about white students.

A. There aren't any white students at Roosevelt.

Q. What about from Stivers; is there any pattern of transfers from Stivers?

A. The pattern of Stivers is from schools of Wilbur Wright or Belmont, and they are seeking German and latin.

Q. Is there a school with a humanities course that a number of students are seeking transfer to?

A. Yes, there is a humanities course at Meadowdale High School which has been used for transfers also.

Q. That's not a required subject; is it?

A. No, it is not.

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Q. Mr. Carroll, as I understand it you started with the Dayton School System October of 1957; is that correct?

A. Yes.

Q. That was the same year that you first applied to the system for a teaching assignment?

A. That's correct.

Q. You didn't serve any apprenticeship as a substitute teacher; did you?

A. No.

Q. The freedom of enrollment idea as I understand it from your testimony, was a suggestion which you had made?

A. No, it was not. It was one I had to implement.

Q. You implemented it and your chief work in the system in the last few years anyway has been assisting special education students to try to avoid dropouts and that sort of thing; hasn't it?

A. That's correct.

Q. As I understand the freedom of enrollment plan, there are three priorities; are there not?

A. Correct.

Q. The first in keeping with State statute on the provision of schools in the attendance district of the child gives a student a first priority to stay in his own neighborhood school?

A. That's correct.

Q. The second priority is an educational priority that if there is a course he can't obtain in his own neighborhood school, he can request a transfer for that purpose?

A. Yes, sir.

Q. You have indicated that students from Roth have sought to go to Meadowdale or Stivers for latin courses or power mechanics courses?

A. That's correct.

Q. What's a power mechanics course?

A. It is a course in machinery which is not offered at their present school.

Q. That I assume requires the kind of equipment that would be expensive to reproduce in every school of the system?

A. I wouldn't know. I don't know.

Q. Then of course, Stivers is an integrated school, is it not?

A. Stivers has some black students in it.

Q. In fact, as of today there isn't any high school in the Dayton system that doesn't have some black students in it; isn't that correct?

A. There are black students at most all high schools.

THE COURT: Excuse me. Most high schools or all high schools?

THE WITNESS: Excuse me; all high schools, there are some black students.

BY MR. GREER:

Q. There have also been transfers of students from Stivers to Wilbur Wright or Belmont for educational purposes?

A. Yes.

Q. There have been transfers of black students from Roosevelt to other schools for educational purposes; have there not?

A. Yes.

Q. Has there been any pattern of black students transferring from schools for the second priority, educational courses?

A. Very seldom. There have been some, yes, sir.

Q. What have been those transfers?

A. Those transfers have been whereby the youngster has known a particular course that he wanted, and he would mention — an example — a course let's say, humanities. He would really want humanities, to go to a course, but he could also go according to racial balance.

Q. And the third criteria, after the attendance zone and the educational criteria, if any student can go to any other school if there is capacity for him and if his attendance at that school would improve the racial balance in the school; isn't that correct?

A. That's correct.

Q. This is a policy that has been in effect in the Dayton School System since September of 1969?

A. Correct.

Q. The upswing in the system in this current school year is attributable to the fact that these students are given free transportation; isn't that correct?

A. Yes.

Q. Up until this school year, because of financial matters,

if they were enrolled in freedom of enrollment, they had to get to the school they wanted to on their own pocketbook?

A. Yes, sir.

[R. I. 713, Vol. 7] A. 716 high school youngsters.

Q. And in addition to those 716 students, there were 625 elementary students?

A. That's true.

Q. And if we look to the non-minority races over the periods that we are talking about, there were 23 students that transferred under the freedom of enrollment program in the elementary and middle schools; is that right?

A. That's true.

Q. And 89 in the high schools?

A. That's true.

Q. Now, some of these transfers would be from predominantly black schools to predominantly white schools, would they not?

A. That's true.

Q. And there are a few that are from predominantly white schools to predominantly black schools?

A. Correct, yes.

Q. The transfer depends on the choice of the student and the available space?

A. That's true.

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[R. I. 729, Vol. 7] Q. In your administration of this program, you haven't made any distinction between students who apply under the second priority for educational reasons as to whether they are white or they are black; have you?

A. The guidelines state that if one transfers under the second priority, that they will transfer, and all except a few of those have been white students.

Q. But if a black student transfers under the second priority, he is treated in exactly the same manner as the white student who applies under the second priority; isn't that true?

A. Yes.

M. TESTIMONY OF JAMES R. CALDWELL.

[R. I. 731-735, Vol. 7] Q. Would you state your name, please?

A. James R. Caldwell.

Q. How long have you been a resident of Dayton?

A. All my life.

Q. Where did you go to college?

A. Tennessee State University.

Q. During what period of time?

A. From '50 to '54 – '49 to '53.

Q. What kind of degree did you get from Tennessee State?

A. B.S.

Q. Did you get a teaching certificate?

A. Yes, I do.

Q. What kind of teaching certificate?

A. Health and physical education biological sciences.

Q. High school letter?

A. Yes, sir.

Q. Did you play football at Tennessee State?

A. Yes, I did.

Q. Did you apply for a job in the Dayton School when you graduated from Tennessee State?

A. Yes, I did.

Q. What happened?

A. When I made application for a job in the Dayton Schools, I was told that the only openings that they might have would be at Dunbar, and at the present time they didn't have any.

Q. So what did you do?

A. I left and started playing professional football, and all season I was teaching in the State of Tennessee.

Q. Where did you play professional football?

A. The Chicago Bears and Calgary Stampeders.

Q. Where did you teach?

A. Davidson Academy in Tullahoma, Tennessee and Booker T. Washington in Chattanooga, Tennessee.

Q. Were you a coach at those schools?

A. Yes.

Q. What sports did you coach?

A. Football, basketball, and track.

Q. When did you return to the Dayton area?

A. In the latter part of '59.

Q. Did you apply for a job with the Dayton Public Schools?

A. Yes.

Q. What happened?

A. They said they had no openings in the health and physical education department.

Q. So, what did you do?

A. Went to Hamilton to set up the school program at the Juvenile Court under the direction of Dr. Dickey.

Q. Did you return to the Dayton Public Schols?

A. Yes, I got a call one evening asking me if I were interested in taking a job at Roosevelt as a science teacher and a football coach.

Q. Was that as a head football coach?

A. No, as a line coach assistant.

Q. Did you accept that position?

A. Yes, I did.

Q. How long did you remain at Roosevelt?

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A. Until '68.

Q. During that period of time could you just tell us in rough terms what happened to the faculty and pupil composition at Roosevelt?

A. When I first went to Roosevelt, I guess it was about 60-40, and at Third Street at one time was the dividing point as far as blacks and whites are concerned, and as the blacks continued to move into that area, the blacks became more dominant in Roosevelt.

Q. What happened to the faculty composition?

A. It became more dominant too.

Q. During that period of time did you remain as an assistant coach at Roosevelt?

A. Yes.

Q. Were you ever offered a position as a head coach?

A. I was promised a position as head coach at one time, but later it was changed.

Q. You did not get it?

A. No.

Q. Did you also coach freshman football?

A. Yes, I did.

Q. What were the records of your team?

A. I had the best record in the history of Roosevelt. I lost no games and only one team crossed the 50-yard line for one play.

Q. In 1968 where did you go after you left Roosevelt?

A. To Roth High School.

Q. What was the pupil racial composition at Roth High School at that time?

A. I guess it was about 60 percent black and 40 percent white.

Q. What position did you take?

A. As a teacher and coach.

Q. Were you a head football coach?

A. No.

Q. In 1969 did you take another position?

A. Yes, as student community coordinator.

Q. What is your present position?

A. Assistant principal at Roth.

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Q. Mr. Caldwell, as I understand it when you secured a job in the Dayton System, they called you rather than you calling them; is that right?

A. Yes.

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N. TESTIMONY OF DORIS BROWN.

[R. I. 762, Vol. 7] Q. Will you state your full name and your occupation, please?

A. I am Doris Brown, Principal at Miami Chapel School.

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[R. I. 765-769, Vol. 7] Q. What is your employment history?

A. I graduated from college in 1942. I started working in a small town, Georgetown, South Carolina, and during the War years I wanted to make a more direct contribution to the War effort, so I went into Government work. I came to Dayton at that time.

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Q. Did you seek employment at that time with the Dayton School System?

A. Yes, I did. I decided to go in and talk with them to see what the possibilities were, and at that time I was told –

Q. Can you give me the year please, approximately?

A. Approximately either '55 or '56.

Q. All right.

A. I was told that I would have to substitute and I figured no way, you know. I would be losing income to go into the school system in the first place.

Q. That is if you were employed full time?

A. If I were employed with the school system. I did lose income when I went to the school system because I was making more with the Government than when I was employed at the school.

Q. And did you substitute at all?

A. No, I didn't.

Q. All right. Did there come a time when you obtained a job with the Dayton School System and can you tell me how that came about and where you were assigned?

A. When I had an opportunity to talk with the person who

interviewed me and personnel, they indicated that there were vacancies, a few possibilities and the schools names were Willard, Wogaman, and Miami Chapel.

Q. Were these black schools?

A. Yes, black.

Q. And did you accept an assignment?

A. I accepted the assignment at Miami Chapel.

Q. Did you receive any rating in terms of your qualifications during your period of time at Miami Chapel?

A. Yes. I was told that it was one of the best ones that had ever been given by that administrator.

Q. What kind of rating did you receive?

A. Excellent if you want to call it that.

Q. Mrs. Brown, are you related to Herman Brown who has testified in this court?

A. No.

Q. And at Mr. Brown's suggestion, did you contact the Personnel Office in the school system concerning a vacancy in the position of assistant to Mr. Royer?

A. Yes, I did.

Q. Let me ask you first of all did Mr. Herman Brown indicate to you what he understood the qualifications that were being sought were?

A. Yes.

Q. And what were they?

A. When he went for an interview, he did tell me that they wanted a woman, so I went.

Q. And did you have an interview with Mr. Royer?

A. Yes, I did.

Q. And what were you told?

A. Well, that no decision was made; in other words, it was just we will consider you and we will let you know.

Q. All right. Did they tell you what sex they were looking for? Did he indicate that to you?

A. No.

Q. Did you subsequently obtain a position in the central office?

A. Yes. I was offered a job as interviewer for the Special Assistance Program.

Q. That would be a Federally funded program?

A. Yes.

Q. Did you take that position?

A. After thinking about it, I did take it.

Q. And was this the same kind of position that you had had in terms of overall responsibility that you had been applying for since the War?

A. Really no.

Q. You made substantially less, did you not.

A. Yes.

Q. And it was limited to Federal programs?

A. Yes, in the basement of the building.

Q. All right, and did your responsibilities include all schools in the system or only those with Federal programs?

A. Only the Federal.

Q. Was there a concentration in terms of employment there in terms of black or white for the Federal programs?

A. A high percentage of black.

Q. Primarily your job that was interviewing black applicants; is that right?

A. Generally speaking, that's the way it was.

Q. And Mr. Royer had a higher position with more general supervision than you did; is that correct?

A. Yes.

Q. I believe, in fact, the minutes of the Board of Education reflect that you were appointed to your position on the same date he was appointed to his; is that right?

A. Yes.

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Q. How long did you stay in that position, Mrs. Brown?

A. About a year and several months.

Q. Why did you leave that position?

A. I was offered a position as Principal of Miami Chapel School.

Q. And did you prefer that position at Miami Chapel?
A. Yes.

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O. TESTIMONY OF GRACE TOLES.

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[R. I. 741, Vol. 7] Q. Would you state your name please?
A. Grace Toles.
Q. Where do you reside?
A. Dayton, Ohio.

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A. Yes, I am.
Q. Are you presently employed?
A. Yes.
Q. By whom?
A. Dayton Board of Education.
Q. In what capacity?
A. Assistant Principal at Longfellow Middle School.
Q. How long have you been in Dayton, Mrs. Toles?
A. Fourteen years.

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[R. I. 743-747, Vol. 7] Q. By whom were you interviewed to be employed as a teacher or as an employee of the Dayton Public Schools?

A. Homer Royer.

Q. Do you recall the year that you were first interviewed?

A. In the summer of 1957.

THE COURT: Excuse me. Was that '57 or '67?

THE WITNESS: '57.

BY MR. JONES:

Q. And what were you told by Mr. Royer with regard to your desire to become an employee?

A. He told me that there were no vacancies in my field and his advice to me was to retrain for the elementary.

Q. In what respect did he say there were no vacancies?

A. Well, he said there were no vacancies for black teachers in the high school.

Q. Did he make a suggestion to you?

A. He suggested that I retrain if I was interested in anything.

Q. What was your response to that?

A. That I had trained for high school and I was not interested in retraining for the elementary level.

Q. Did you have a later occasion to talk with Mr. Royer?

A. There was an article in the paper later that they needed teachers, and I asked for an interview and I was told to come in again.

Q. And did you talk to Mr. Royer at that time?

A. Yes.

Q. Did he ask any questions of you with respect to your desires?

A. Well, he asked me how did I feel about going into an all-white school to teach, and I explained to him that I was interested only in teaching children. My position there would not be to socialize.

Q. Would you tell us what school you were first assigned to after first being employed?

A. Roosevelt High School.

THE COURT: What year were you employed?

THE WITNESS: 1957 in the fall.

THE COURT: Then this interview did result in employment?

THE WITNESS: Yes.

THE COURT: Thank you.

BY MR. JONES:

Q. You were employed to teach at Roosevelt High School?

A. Yes.

Q. Do you recall the number of faculty members there were at Roosevelt at that time?

A. 121.

Q. Now, of that number, do you recall how many teachers were black at the time you went there?

A. There were two prior to my being hired and there were four the year that I was hired. There were six blacks at the time.

Q. How long did you stay at Roosevelt?

A. Thirteen years.

Q. Can you tell us what the student population was at the time you went there?

A. It was predominantly white. I would say about 93 percent white.

Q. What was it at the time you left?

A. 99 percent black.

Q. What was the faculty composition, if you recall, just prior to your leaving, a year or two prior to your leaving?

A. We had a 70-30 ratio, and I am not certain of how many whites were there.

Q. Prior to that time you say when you went there, there were two black faculty members?

A Yes.

Q. And four came with you?

A Yes.

Q. At what point would you say the faculty had the highest number of black teachers?

A. I would say about midway '67. I would think that more blacks – as the population of the student body changed, the staff changed.

Q. Would you know approximately what that percentage would have been?

A. I would say possibly about 70 percent black.

Q. Were you able to observe the process under which the faculty changed from predominantly white when you went there to 70 percent black?

A. As the student body changed, I think I said before the faculty changed, and there were two high schols that were opened, Meadowdale and Roth, and I noticed a change after these schools were staffed.

Q. To what do you attribute that change in the student population after these two schools were opened?

A A number of things. The area was changing as far as housing is concerned. The other thing, the white students that were in the area were allowed to go to Colonel White or Patterson. Colonel White was in the optional area.

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[R. I. 749-750, Vol. 7] THE WITNESS: As I said, academically I noticed that there was a change as far as what was being taught and how it was taught.

BY MR. JONES:

Q. Can you describe that in a little more detail?

A. Yes. We used to rate on tests and we taught toward this. It was decided by committees within the particular disciplines that we didn't need to worry about this any more because students had so many deficiencies that we would only teach toward correcting the deficiencies rather than trying to compete as far as city or state tests.

Q. With regard to the physical tools and equipment in the schools, did you notice any change take place?

THE WITNESS: I noticed that as teachers moved to other schools, the materials that they had accumulated that really belonged to a particular school in the district – if you have Roosevelt materials, they belong there– but they suddenly disappeared and they were not, you know, replenished.

Q. Did you have occasion to observe the teachers who replaced those who were transferring out?

A. Yes. In may particular field seemingly the ones that were sent in were weak, oftentimes they were teachers that had ben assigned to other schools and had not made it and they were transferred there.

P. TESTIMONY OF LELIA I. FRANCIS.

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[R. I. 791-792, Vol. 7] Q. Are you familiar with the Garfield School area?

A. I am familiar with the Garfield School and the Willard School. Willard School is where by daughter went to school when I first came to Dayton, and it was a predominantly black school.

Q. Now, when you lived in the Garfield area –

A. I lived – not Garfield, Willard.

Q. Willard?

A. Yes.

Q. Did you know of any bussing of children out of there?

A. Definitely. I had occasion to talk to a woman who lived in an apartment above a store at the corner of Germantown and Summit. Willard was on the corner of Germantown and Summit. She wanted her child to go over there to school.

Q. Was she black or white?

A. She was a white woman. And they refused to let her child go just across the street, and a bus picked her up and carried it out from Summit and Germantown.

Q. You say Willard or Wogaman?

A. That is Willard.

Q. O. K.

A. Willard.

Q. Did you know of any other students, white students, who were bussed out of particular school areas?

A. The children from – when Wogaman changed, why those children were bussed out of the Wogaman district.

Q. When you say "those children" you mean the white children?

A. The white children were bussed out of the Wogaman School District.

Q. What was the effect of the urban renewal policy in terms of residents of blacks in East Dayton in the early years?

A. Well, the urban renewal program became known as the black removal program. They removed all of the black people from near the center city of Dayton, Ohio. You will not find one black person in that section now.

And the same thing happened in the east end. They moved all of the little pockets of black people who were out there. Why, they encouraged them and made it possible for them to buy property in the West Dayton area.

Q. This was true also of the public housing where they were building white projects in East Dayton, is that right?

A. Right.

Q. Did the relocation agencies actually relocate black people in West Dayton?

A. Absolutely. Absolutely.

Q. TESTIMONY OF DAVID GEORGE CARTER.

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[R. I. 795-797, Vol. 8] Q. Would you state your name, please, sir?

A. David George Carter.

Q. What is your present position?

A. Service Unit Administrator with the Dayton Public Schools.

Q. Who do you work under?

A. Mr. John Harewood, Assistant Superintendent in charge of administration.

Q. How many other service unit directors are there?

A. Two.

Q. What is your basic responsibility?

A. I have the administrative responsibility for 25 schools, three special programs. The special programs are Model Cities Education Component, Project Emerge, which is a Title 8 dropout provision program, and the COP program.

Q. Are you also in charge of a set of schools?

A. The schools, yes, 25; four high schools and twenty-one elementary and middle schools.

Q. In some other school systems, might this be called a regional superintendent?

A. Yes, and if you are in Detroit they would have district superintendents; if you were in Philadelphia, they would have district superintendents; if you were in Madison, Wisconsin, they have unit directors, the same as we have in Dayton, Ohio.

Q. When did you go to high school and where?

A. 1957 through 1961, June of 1961, Roosevelt.

Q. When you arrived at Roosevelt High School, what was the pupil population?

A. Approximately 21, maybe 2200.

Q. What was the racial composition?

A. Maybe 40 percent black, or 35 percent black, something like that.

Q. During the four-year period that you were at Roosevelt High School, what was the change in both the total enrollment and the pupil racial composition?

A. Okay. The enrollment during the time I was there was basically, I guess about the same, 2100 or so. I guess several interesting things happened when I arrived at Roosevelt. There were approximately, I can remember seeing five black teachers. Okay. Maybe there were a couple more.

Each year the number of black teachers increased, but also each year the number of white students decreased.

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[R. I. 797, Vol. 8] Q. During this period of time of transition, do you have any idea where the white students attended school?

A. Yes. I guess, if we are talking about '57-58, after my freshman year, it is rather difficult to say, for some individuals that I went to elementary school with at Addison never arrived at Roosevelt, which leads me to believe one of two things – and they still stayed in Dayton; they resided the same

places, in Summit Courts, which is now called Lower Dayton View, if you are familiar with Dayton, right off of Negley.

Black students that lived in that area made it to Roosevelt. Okay. When you asked me what happened to the whites, they disappeared.

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[R. I. 807-813, Vol. 8] Q. During your tenure as the principal of the Jefferson School, were you ever aware of any of your white students who instead of attending the Colonel White High School attended other high schools?

A. Yes, one in particular. In May of '68 a parent approached me concerning that Colonel White was going on what was called a block system, and that she didn't feel her child could function there, nor did she approve of that particular system. Not even a comment on the block system, because I wasn't that familiar with it, all I could say was that the Board, as guidelines now stand, your child, if you still remain where you are presently staying, will have to attend Colonel White. That child has never attended Colonel White. He is now a senior at that particular school.

Q. At what school?

A. Meadowdale High School.

Q. What was the reason for his attending Meadowdale?

A. Well, the answer given to me, that he was taking a unique course; however, the course that he took last year, that was supposed to be unique, was offered at Colonel White and is offered again this year. I did bring this to the attention of the superintendent, as well as the superintendent in charge of student development, and nothing happened.

Q. What was that unique course?

A. Photography.

Q. Because of that election, that student was allowed to attend all of the classes in the high school?

A. That was told to me; that was the excuse.

Q. Are you aware of any black children in predominantly

white high schools who had been transferred to black high schools?

A. Last October or November, plus or minus two or three months, because I could be off, Mr. Webb, principal of Roosevelt High School, called my office and stated that he had a student that had been sent to him from Fairview, and he was not – he questioned whether or not he should admit that youngster. I directed Mr. Webb not to admit this child until I was able to read, you know, through the records to find out why the youngster was being sent there.

After going through a search for more information, I checked with the visiting teacher at Fairview, Eileen Morrison, Bart Cromer, who happened to be the visiting teacher at Roosevelt School. Dr. Carle, the superintendent of schools; Bill Goff, assistant superintendent in charge of student development, everybody agreed that this young man should not be sent to Roosevelt. He was sent there.

Q. Was this under one of those so-called hardship transfers?

A. Man, don't start me on that because everything appears to be a hardship for somebody else, but, you know, nobody looks at their over-all effective building. If for a moment you can look at Roosevelt now receiving youngsters – see, when we talk about freedom of enrollment, we are talking about black rape, because we see children that are talented, they are accepted somehow in the white community, but those that appear to have problems are sent right back. If freedom of enrollment was in fact just, then, hey, I am a student of your building, work with me like you do any student, Mary who lives next door down the street. Don't tell me that when I am in trouble I am different.

MR. GREER: Your Honor, if I might –

Q. Mr. Carter, are there any, and if so approximately how many, white children who take advantage of the freedom of enrollment to transfer to predominantly black schools?

A. I know of none.

Q. That does not mean there might not be a few?

A. What's a few when you are talking about 500 black kids going across town, and we are talking about one white or two whites.

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Q. Now, with respect to the curriculum transfers, are there instances where white children take advantage of that through transfers from a black school to a white school?

A. I gave you the example, the individual who left Jefferson and went to Meadowdale.

Q. Are there other such examples?

A. I can't cite specific examples. However, the way the policy is written up it is possible that – the policy as written states that curriculum changes do in fact have priority over racial changes.

Q. Now, are you aware of the capacity limitation on the freedom of enrollment policy?

A. I am, but I am also aware that there is a discrepancy in that. We have had three changes in freedom of enrollment. One we dealt with, first of all, what the principal said. If he said his building was full, it was full.

Secondly, we tried to deal with projected enrollment. The third area is actual enrollment within a building, the number of youngsters that could actually attend a building without filling all of the classes.

Q. Now, are those actual enrollments that are projected the same as the rated building capacities?

A. Not necessarily. Not necessarily. As an example, you may have a projected enrollment for 700 in a building, you may have only 600 attend. The actual capacity may in fact be 1,000.

Q. In other words, in terms of the individual capacity to accommodate the children?

A. That's correct.

Q. And what would be required then would be the reassignment of some teachers in order to maintain some sort of class size?

A. Yes. This year what we have had to do is that we, because of freedom of enrollment, population shift, we have transferred teachers from one building to another, and, yet, we still have space, you know, and also we have turned back applicants.

Q. Black applicants?

A. Yes. I am aware of some because I work with them.

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[R. I. 850, Vol. 8] Q. Now, if we had a square here hypothetically and this were the Jefferson School zone, what you are describing in terms of overcrowding might be called spot or non-contiguous zoning. In other words, we take a quarter here and assign them to a school someplace else in the school district.

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Q. Mr. Carter, are you familiar with other school systems where often they use this type of zoning, spot or non-contiguous zoning for overcrowding and other purposes?

A. Some for racial discrimination.

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[R. I. 856-859, Vol. 8] Q. Mr. Diamond drew some pictures on the board and I just wanted to get back to the specifics of this overcrowding situation at Jefferson Elementary School while you were there.

In the 1969-'70 school year, the Jefferson Elementary School remained approximately 80 percent black in its student composition, did it not?

A. '69-'70? I think it was about 65 or 70, maybe 70 percent black.

Q. All right. And while it remained at that composition because of the overcrowding in that year, black students were transported to Fairport Elementary School, were they not, 18 students?

A. I can't comment on the number.

Q. But there were black students transported to Fairport, were there not?

A. That is correct.

Q. And that was an essentially white elementary school or predominantly white elementary school?

A. An elementary school that was beginning to change also.

Q. And some 22 black students from Jefferson were transported to Ft. McKinley Elementary School, were they not, during that school year because of the overcrowding?

A. Yes.

Q. And that was in an essentially white school district, wasn't it, neighborhood?

A. Yes.

Q. And 42 black students, because of the overcrowding, were transported from Jefferson to Loos Elementary School, were they not?

A. I can't comment on the number of blacks.

Q. But, at any rate, –

A. Students were.

Q. All right. And that was a predominantly white elementary school, was it not?

A. Yes.

Q. And some 37 were transported to Horace Mann, isn't that correct?

A. Yes.

Q. And Horace Mann is over in the southeast side of Dayton?

A. Yes.

Q. And it is a predominantly white elementary school, is it not?

A. Yes.

Q. And 19 of those students from Jefferson were transported to Hickorydale, were they not?

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A. Yes.

Q. And that is an essentially white elementary school, is it not?

A. Yes. You mean then or now?

Q. In the 1969-'70 year, when this occurred.

A. O.K. I think there were blacks. I can't comment on the racial make-up. I think it was predominantly black.

Q. And the other schools to whom these Jefferson students were transported because of overcrowding were Shiloh, which is the northernmost elementary school, Shoup Mill and Valerie, isn't that correct?

A. Yes. And that is where we had the receiving parents in an uproar because they didn't want them there.

Q. And all three of those schools were predominantly white, were they not?

A. Yes.

Q. No other elementary schools were involved in that effort to relieve the overcrowding situation that existed at Jefferson in 1969 and '70, were there?

A. No, sir. That is where all the space was. There was no space on the west side.

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R. TESTIMONY OF KARL TAEUBER.

[R. I. 899-922, Vol. 9] Q. Would you give me the index of segregation as to each of those categories?

A. Okay. The residential segregation index for Dayton for 1960 is 91; the segregation index for students in the 1967-68 school year is 90; for staff, it's 78.

THE COURT: For which year, Doctor?

THE WITNESS: This is 1967-68.

THE COURT: That's the staff?

THE WITNESS: Yes, sir.

Q. Doctor, you have there the 1960 residential data. Have you calculated the index for residential segregation for each of the census years beginning in 1940?

A. Yes, I have.

Q. Can you give us the index, if you will, for those years?

A. For 1940, the black-white index of residential segregation was 92; for 1950, 93; for 1960, 91; and for 1970, 90.

Q. The 93, that was the 1950; is that correct?

A. That's correct.

Q. Is this a pattern in other cities, with respect to the 1950 census in the north, the increase?

A. I assume you are referring to this increase. I might comment first that the change from 92 to 93 and back to 91 and 90 represents a very small amount of change compared just to absolute numbers and compared to the amount of change that does show up in some other cities, but in specific answer to your question, it is true that most cities throughout the country showed some increase in 1940 to 1950.

Q. That would be increase in residential segregation by this index; is that correct?

A. That is correct.

Q. These are all 90 or above, and the perfect segregation is 100?

A. That's correct.

MR. LUCAS: I am sorry; not perfect. Qualify me on that word.

THE COURT: Total.

Q. Do you have the figures for 1970 census? Could you calculate the figures for students in 1970?

A. Yes. The segregation index for Dayton School pupils in 1970 is 83.

Q. The residential is what?

A. The residential is 90 in that year.

Q. What was the faculty in 1967?

A. The faculty in 1967 was 78.

Q. Did you calculate the pupils and faculty for 1972?

THE COURT: Together, or are these separate?

MR. LUCAS: Separately.

THE WITNESS: For 1972 enrollment data, the pupils index was 79; for teachers, it is 15.

BY MR. LUCAS:

Q. Your experience with the data, is that a substantial drop from the 1967 data with regards to faculty?

A. Yes, that's very substantial. As I mentioned, the fact that in any case there will be some random variations so that you won't reach exactly zero.

Q. Dr. Taeuber, were you aware that there was a faculty desegregation plan implemented in that year?

A. I was told after calculating the data, yes.

Q. Have you broken down any of the pupil segregation indexes by elementary and high school?

A. Yes. I calculated the indexes for each of these years separately for elementary students and for high school students.

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THE WITNESS: For 1967 – excuse me a second. I didn't realize you were going to ask that particular question. For 1967 the segregation for elementary school pupils is 91; for 1972, it's 87. For high school students, the 1967 segregation is 89; for 1972, 68.

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[R. I. 924, Vol. 9] Q. All right. And then assume that the School System has – I am pointing generally to the map, but not necessarily to particular schools.

Assume along the area of change, 1970, Cornell Heights, Jefferson, in that range there, assume along that area of change that the School System for the first time assigns black teachers to the schools in the area of change which already have between 35 and 69 percent black students.

At the same time, there are a large number of schools with no black teachers in them, and almost only white children in them.

What effect, if any, in light of the past assignment practice, does the assignment of black teachers to those schools and not the others have in terms of identifying these areas?

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A. I think that this would be treated as information by anyone interested in what might happen to these schools that they are being defined as becoming black schools in the pattern where most schools are either entirely black or entirely white, so that it is a move in this hypothetical case toward defining the school as one which is becoming in the context of the racial views of the population more suited for black students than for white students.

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[R. I. 946-947, Vol. 9] THE COURT: Would you ordinarily expect that the residential index and the student index would be approximately the same?

THE WITNESS: Within this five or ten points that's due to the difference in areas used, data base.

THE COURT: And that would be both ways. Whether or not the student index was substantially greater than the residential index, or substantially less, if it varied more than this five or ten percent, that would indicate some specific action had been taken by somebody, am I correct?

THE WITNESS: No, because the blocks are small areas and the school attendance zones are larger. I would expect the school index to be somewhat lower than the block residential index. If the school measure were higher, even by just a point, I would assume there must be some – or that there is probably some kind of action that means that the attendance areas are not strictly – that the school attendance is not strictly based on the attendance areas.

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S. TESTIMONY OF WAYNE M. CARLE.

[R. I. 954-955, Vol. 9] Q. Give your full name and occupation, please.

A. Wayne M. Carle, Superintendent of Schools, Dayton.

Q. Dr. Carle, would you give us your educational background, please?

A. I earned my A.B. Degree at Brigham Young University majoring in English and secondary education. The Master of Education Degree I received from the same institution. The Ph.D. degree at the Ohio State University, and the area was education.

Q. All right. Would you give me your employment history, please?

A. Yes. In the years 1948 to 1952 I was a writer, a newspaper writer. In 1952-'53, I was a teacher of a rural consolidated district, Roosevelt, Utah, and in the following years a high school teacher in Provo, Utah, and then an instructor at the Brigham Young University. In 1958, I believe, I was a mass media fellow of the Fund for Adult Education.

Q. And where was that?

A. At the Ohio State University. In 1959, I joined the Akron Schools as Administrative Director for Research and Information. In 1962, I became Assistant Superintendent for professional personnel. In 1966, I joined the State Department of Education of Ohio as Assistant State Superintendent of Public Instruction in charge of instruction, and in 1968 became Superintendent of Schools of Dayton.

[R. I. 956-958, Vol. 9] Q. Your present employment is Superintendent of Schools in Dayton; is that correct?

A. Yes.

Q. Dr. Carle, what were your duties when you were Assistant State Superintendent?

A. I was in charge of the area of instruction which included five divisions, one of them for the chartering of schools, about 5,000 elementary and secondary schools involving annual inspections; the area of teacher certification involving the accreditation of 51 teacher preparation institutions and about 90,000 teacher certificates; the area of instructional materials; the division of special Education, that is, education for the handicapped; and the area of guidance and testing for the State of Ohio.

Q. You mentioned chartering schools. Will you tell me what you mean by that?

A. Yes. Until about the time I joined the Department, it had to do with issuing charters for new schools and then inspecting them for meeting state standards. At about that time, about 1966, as I remember, the legislature changed the term to chartering of school districts meaning presumably that all the schools within a district must meet standards and the report forms were developed for that purpose.

Q. All right. Was this one of your particular assignments?

A. Yes, that was one of the divisions over which I was responsible and in which I would engage if there were appeals or problems arising from them.

Q. Am I correct in analogizing chartering to accreditation?

A. Yes, the term accreditation often is applied to a voluntary association such as the North Central Association of colleges and secondary schools and chartering is a specific term used in Ohio to specify accreditation or certification by the State Department of Education. They are separate processes but they are related.

Q. All right. Did you have any particular responsibility with respect to chartering multi-county schools? Did that fall into that jurisdiction?

MR. HOLSCHUH: If your Honor please, I have not objected, but I assume that none of this testimony is being offered in connection with any issue involving the State Defendants.

THE COURT: I would assume this is by way of background, is it not, Mr. Lucas?

MR. LUCAS: Yes, and it will lead to the State Defendants in relationship to the Dayton School System.

MR. HOLSCHUH: Then, I do object, your Honor.

THE COURT: I am going to sustain Mr. Holschuh's objection. We are not going to determine at this time the relationship of the State Defendants to the Dayton School System.

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[R. I. 974, Vol. 9] A. I think you asked me something to the effect of whether racial segregation bore on the chartering of the school, something to that effect.

MR. LUCAS: Yes.

MR. HOLSCHUH: Your Honor, I believe my objection is in the record.

THE COURT: Overruled.

A. I recall the situation in 1966, approximately, when the Middletown Board of Education was completing a new high school, and it was time to request a charter for that school. There was some controversy in the community that the fact that the new school was located in, I believe, a white area of the City, and the old building was in a black area, or at least a mixed area of the community, and that if indeed a new high school were opened and the other left operating as a second high school, that one would be racially segregated quietly.

It was represented to my department that if an exception in standards could be made so that the schools could be chartered as to campuses of one building, that the objection to segregation could be overcome, and it is my recollection that we thereby gave a waiver and that the school then operated when it opened, approximately in '67, perhaps '68, as a ninth year, a vocational program on one campus, and ten through twelve on the other campus, so that all students went to both buildings.

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[R. I. 978-982, Vol. 10] Q. Did it lay certain steps that you thought had been positive steps taken by the Board prior to your coming?

A. Yes. I had, for example, noted but in fact I guess the only word I can use was I was appalled. I felt I was very familiar with urban schools, having spent by then a dozen years working with urban centers, particularly in Ohio, and having been a personnel man, I was appalled to learn, after I got into the personnel situation, that we had completely segregated staffs in some buildings, and so we had made

efforts, particularly up to that first summer, to try to begin breaking that down.

I directed the personnel department to make efforts to assign more teachers across racial lines for the following school year, and also there had never at that point been a black administrator, for example, assigned east of the Miami River. There had been only one general administrative officer who was black.

These things were appallingly evident, and I tried to address them, and then pointed out after becoming aware of that statement, that "the predecessors of this board also have been concerned with racial balance. With respect to the West side, for example, records indicate the determination, in the early 'fifties,' to attempt to reduce the concentration of minority-group pupils in the then three schools with predominantly Negro enrollments — Wogaman, Garfield and Willard, by transferring parts of these districts and integrating other schools.

The subsequent large increase in non-white enrollments in the surrounding schools, however, finally negated this effort."

MR. GREER: I am sorry, Dr. Carle, I missed part of your answer.

THE COURT: So did I Dr. Carle.

THE WITNESS: Am I reading too quickly?

The paragraph noted that predecessors of the present Board had been also concerned with racial balance, and then I said with respect to the west side that there had been a transfer of predominantly Negro enrollments from Wogaman and Garfield and Willard by transferring parts of these districts and integrating other schools. The subsequent large increase in non-white enrollment in the surrounding schools, however, finally negated this effort.

THE COURT: Dr. Carle, may I inquire: This was a reference to boundary changes?

THE WITNESS: Yes.

THE COURT: That were intended to increase the racial balance; is that correct?

THE WITNESS: Yes, sir.

THE COURT: By taking portions of those three schools, the attendance zone, transferring them to other schools?

THE WITNESS: Yes.

THE COURT: It was not the reverse; it was not an effort to segregate further the black population; is that correct?

THE WITNESS: I have reviewed what records were available at that point, your Honor, and found a reference to what apparently in 1951, I believe, was an effort to rezone Garfield, Wogaman and Willard. At least those were the schools I apparently found reference to at that time, and that black enrollment in those schools had been assigned to the neighboring schools.

And I note, of course, that the large now white enrollments in those surrounding schools resulted, of course, in their becoming all black as well.

THE COURT: This is in 1951?

THE WITNESS: '51, I believe.

THE COURT: You are referring to a communication in 1957?

THE WITNESS: Right. In '67, I am sorry – '68, I should say.

BY MR. LUCAS:

Q. This is your own presentation?

A. I was at that point trying to summarize the progress made to that Committee. I had noted first that the Board in '67 had adopted a policy which says, "Every reasonable and constructive measure that can be effected will be taken for the ultimate elimination of racial imbalance in our schools," and then I in my statement to the Board reporting on an anniversary of that date pointed out that in addition to that action I had found, I believe the years 1961, that a prior Board had made those boundary changes.

Then I noted that I had recalled the 1963 Ohio Civil Rights Commission report in which all school districts were required to report on teaching and student racial characteristics; that

the Dayton Schools had been among the largest employers of Negro teachers in the State in relation to their population.

Then I went on to report, and I won't try to quote the rest, on the fact that there were now some black administrators being assigned to other schools; that there was some teachers who had been assigned across racial lines, and that there was some curriculum materials being purchased having to do with minority contributions.

THE COURT: Dr. Carle, excuse me once more. The document you are looking at, does that have an exhibit number? Can you tell me, Mr. Lucas?

MR. LUCAS: No.

THE COURT: Is this a report that Dr. Carle made to the School Board?

THE WITNESS: Yes, it is, your Honor.

THE COURT: I would like this in evidence.

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[R. I. 1103-1104, Vol. 11] Q. Mr. Carle, you were speaking at one point about the meeting with the HEW people. Was there a resolution offered in connection with the desegregation plan at the Board meeting?

A. This came at a time when, as I have indicated, considerable public demonstration was going on from time to time, and we were at the peak of plans for desegregating the staff. One of the reasons for Mr. Mancini's appearing before the Board with questions about whether we did or didn't have to –

Q. Excuse me. Was there opposition to the desegregation of the staff?

A. Yes, indeed. A group of teachers was indicating that it ought to be only voluntary, and the need for accomplishing the task was being asserted. There was a resolution offered to the Board in December of 1970, as I recall, that would have the effect of leaving teacher transfer a voluntary matter.

Q. Who was this offered by?

A. Mrs. Groff, a member of the Board of Education, offered the resolution, the context of which was that teacher transfers should only be on a voluntary basis.

[R. I. 1004, Vol. 10] Q. How does this relate, Doctor, if at all, to previous practices of the Board of Education?

A. Well, as I reviewed the personnel files and the past observations in the district, there was virtually no transfer, that is, there was very little transfer of teachers, and up until the early 1950's, a policy of no assignment of black teachers to classes with white pupils.

Along about that time, I think I had referred to some statement I had seen of either administration or a Board indicating that that practice was to cease and that there would be gradual assignment of black teachers in communities or in school areas where the communities would accept them. That practice discontinued – well, it was in force when I came to the district, in that there still were schools in which there were no black teachers whatsoever, and the personnel department, as I discussed the necessity of moving in that direction, would insist that some communities had never had a black teacher or were not ready for a teacher or a teacher is not ready to go there.

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[R. I. 1049, Vol. 11] A. Yes. The Board did subsequently sign a statement which, among other things, says "There will be no forced bussing during the term of the administration of the current School Board unless it is so ordered by lawful authority."

THE COURT: Dr. Carle, what are you reading? Is that an exhibit?

THE WITNESS: No, it is not. It is a statement that was signed by the seven members of the Board of Education.

THE COURT: Gentlemen, may I ask that this be put in as Joint Exhibit II.

MR. GREER: Perfectly agreeable your Honor.

MR. LUCAS: Yes, sir.

THE COURT: What is the date of that?

MR. WALTERS: October 26, 1970.

THE WITNESS: Your Honor, I think I said earlier November of 1971. If I did, I would have meant November of 1970.

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[R. I. 1056-1057, Vol. 11] Q. A lottery?

A. Lottery, I guess, is a good term. So that within those who qualified; that is, who had the basic background and those who were within the racial and sex groups would be drawn by lottery rather than by final selection by coordinators, so that we could remove any vestige of preference within the qualified group.

Q. Did you examine the data with respect to Patterson in terms of where the children come from who get into Patterson and its effect, if any, on the racial composition of other schools?

A. Yes, I believe both counsel have asked us for certain data so that I could reflect both from those data and also from my own experience. Historically, particularly in looking at Roosevelt, for example, at the time at which there were no black students in Patterson and also at a time when the black enrollment at Roosevelt was growing, there were white Roosevelt students enrolling at Patterson and no black students from Roosevelt admitted to Patterson. I became aware of this problem particularly with respect to Roth High School where white parents particularly attempted to enroll students in Patterson as a means of removing them from that racially changing school.

Q. Did they get in, Doctor?

A. Yes. I know of cases in which they did, yes.

Q. Can you see the Drexel School on the map?

A. Yes, sir.

Q. That is an elementary school; is that correct?

A. Drexel is an elementary school.

Q. Are there a number of white students still in that school?

A. Yes, Drexel is a white island in a predominantly black area of the city.

Q. Have you been able to account for where those children attend school in terms of feeder patterns at the present time?

A. No, it has been very difficult in all candor. I believe there is an exhibit showing the intended designation of eighth graders, but for several years the proportion of white students in Roth has not equalled the proportion leaving Drexel. Some of those have gone to Patterson, but we are unable to trace others.

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[R. I. 1069-1072, Vol. 10] Q. All right. Let's take the Edison fire. At the time you became Superintendent, how had students been reassigned following that fire?

A. A decision was made over a period of a day or two to transport the upper grade students from the school, leaving the lower grades in the part of the building that remained.

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A. Classes and teachers intact were taken to several buildings where there was space.

BY MR. LUCAS:

Q. Now, when you became Superintendent, did you make a change in that policy?

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MR. GREER: That is correct, your Honor. I think we can stipulate the date of the fire was sometime in the middle of April of 1968.

THE COURT: Let's go forward.

MR. LUCAS: Your Honor, may I ask the witness why he changed that practice?

THE COURT: You may ask that question.

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Q. I think you have the question, Doctor.

A. The schools to which the students were taken were predominantly white and, of course, the pupils were all black, and to maintain them as intact classes in the receiving buildings would be to segregate them racially within those schools.

I regret to say that, although I asked that that be terminated, it was not immediately terminated.

Q. When was it terminated?

A. During that summer I asked that the curriculum department work with the schools to assure that these classes would be integrated with the classes in the schools. After the school year was underway, in our supervisory visits we found in some of the buildings that there had been resegregation into, for example, reading or other ability groups in which black students were still on a track different from the white students.

So sometime later that year, or by the beginning of the following year, that practice, too, was rooted out.

Q. Do you recall which school that was?

A. Shoup Mill was one in which I recall considerable concern. And I cannot recall specifically others.

I know that there were one or two other schools in which this practice was of concern to us.

Q. Dr. Carle, the Jefferson transportation pupils, what difficulties, if any, did you run into as Superintendent in connection with that transportation to white schools?

A. Extreme difficulties on both ends of the line.

Jefferson had been a school of tremendous impaction over a period of several years.

Q. Excuse me. By impaction, you mean the same thing I do, overcrowding?

A. Overcrowding.

Q. O. K. Go ahead.

A. There had been a decision to add a primary building on the same side as the elementary building, and it was overcrowded from the moment it opened.

There had been use of space in nearby – I believe they were church buildings. There could have been other kinds of buildings used. My recollection is that second grades were selected for that move, and then the following year we determined to transport some pupils –

THE COURT: Doctor, what year was that?

THE WITNESS: I hope it was the fall of '69. It could be the fall of '70. Years telescope as you deal with these things.

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[R. I. 1096, Vol. 10] A. The same statute which gives the Superintendent the authority to assign teachers and other employees to schools in the district also gives to the Superintendent of Schools the authority to assign pupils to the proper schools except for pupils assigned outside the school district for which the School Board is required to act.

BY MR. LUCAS:

Q. That would mean tuition pupils; is that correct?

A. That's correct.

Q. And then my question, Dr. Carle, is why did you not assign the pupils in accordance with the Foster plan?

A. Well, it is a complex question but I guess it is a very simple answer. It would be impossible for me to implement that plan without the support of the Board of Education both from the standpoint of the authority it has over me as its Executive Officer and from the standpoint that it has control of the budget and of the resources and of the policies under which a program that great would operate, and I simply would not place students in the position of not being supported in such a major move.

Q. So, you declined to exercise your authority; is that correct?

A. Yes, that is correct.

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[R. I. 1101-1102, Vol. 11] Q. Dr. Carle, the Court had asked you about the Dunbar School and whether or not the choice was free.

Did you check the minutes, excerpts from the minutes that you had with you while you were on the stand yesterday?

A. Yes. I have a summary of the minutes and I do note that there were at least two occasions on which the Board made assignments of students to Dunbar.

Q. Well, in 1933 I believe the minutes have an entry with respect to the opening of Dunbar, is that correct?

A. I think I have that.

This is June 5, 1933, and the entry says "Be it further resolved that the 7th and 8th grades at Garfield and Willard Schools be discontinued and that the attendance at the Dunbar School be optional for all junior high students for all 7th, 8th, 9th grade levels in the city."

That would be at the time the school was organized.

Q. And Dunbar is where the McFarlane School is presently located on the map, is that correct?

A. Yes, roughly in the same area as Roosevelt High School.

Q. Is there another minute entry in the forties, dealing with the Dunbar School?

A. In 1942, the entry is "Be it further resolved that the 7th grade pupils from the Willard and Garfield Schools be assigned to Dunbar High School."

MR. LUCAS: Thank you.

THE COURT: Dr. Carle, let me ask you a few questions: I was under the impression that Dunbar, from its inception, was an all black high school?

THE WITNESS: Yes, that is my understanding, Your Honor.

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[R. I. 1105, Vol. 11] Q. Dr. Carle, the minutes to which you just referred dating in 1933 and 1942 referred only to 7th and 8th graders; isn't that correct?

A. That's correct in 1933 and in 1942 to 7th grade, I believe.

Q. And I believe in 1933 the Board indicated that the 7th and 8th grade at Garfield would be optional with Dunbar.

A. No. The entry, as I understand it, was that the 7th and 8th grade would be discontinued at Garfield and Willard. Then there is a further entry that junior high attendance at Dunbar would be optional throughout the district.

Q. All right. Now Garfield and Willard Schools which we are discussing were right in the geographical area of the old Dunbar High School which is now McFarlane; isn't that right?

A. That's correct.

Q. And those schools, Garfield and Willard were crowded back in the 30's and early 40's were they not?

A. Offhand, I don't recall what the enrollment situation in those schools was.

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[R. I. 1110-1114, Vol. 11] Q. Then, without regard to to what the position of your Board is, is your own philosophy as you will, opposed to the concept of the neighborhood schools or the forced bussing of students?

A. Neighborhood school is a term that I think defies definition. I have not heard it defined in this court and, therefore, I find it difficult to take a position one way or another on the term neighborhood school. I don't have a feeling about the term unless you define what you mean by that. The term forced bussing to me also has little meaning under the law. The Board of Education is required to provide transportation to students if they are in the elementary grades more than two miles away from school, and my experience has been that parents not only are eager to have that transportation but in some instances is very piqued in our district because we have proposed doing away with transportation that existed for distances less than that, and I therefore hardly look upon the transportation of pupils as being a "forced matter." I think usually it is quite the opposite. Persons want transportation for reasons of convenience and safety.

Q. Well, if I understand you correctly then you would regard these two concepts, the neighborhood school and the forced bussing of students as relatively meaningless concepts, that you can't really take a position for or against?

A. Well, I would find it very difficult to take a philosophical position, because I think both of them have been bandied around and have very little meaning or understanding in terms of any educational or administrative function of the school. I think they are just terms that are used but certainly don't relate to reality.

Q. All right. Now, you are, and back in December of 1971, were aware of the existence of Section 331348 of the Ohio Revised Code, which provides that the Board of Education of each city shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof, isn't that correct?

A. The question is was I aware of that statute, and the answer is yes.

Q. All right. Now, you have also told us on direct examination that you are aware of instances of specialized city-wide schools in the State of Ohio?

A. Yes.

Q. Are you aware of the Walnut Hills Academic High School in Cincinnati?

A. Yes.

Q. You were aware of an application from some people in the Toledo area for a city-wide school that was denied by the State?

A. Yes.

Q. Isn't that right?

A. Yes.

Q. You are of course, aware of the Patterson School, which is a city-wide school in Dayton, are you not?

A. Yes.

Q. That is a vocational high school where the students

work two weeks and go to school for two weeks, is that not right?

A. Yes.

Q. You also indicated on your direct examination the instance of Dunbar, but that has been a school with neighborhood boundaries since 1962, has it not?

A. Again, it has boundaries. I don't know what the term neighborhood would refer to.

Q. Well, you referred to a two-mile radius a few moments ago. The accessibility of an area to the school is what determines its attendance zone, is it not?

A. No. I did not refer to a two-mile radius. I indicated that if a child resides more than two miles from a school, the law requires that he be transported to school. It has nothing to do with the radius or any limitation or guideline as far as distance is concerned.

Q. You would regard that two-mile radius for transportation as irrelevant to the questions of locations of places convenient to the attendance of the largest number of students?

A. I knew of no case in which in any standard of that kind has been applied in Ohio.

Q. All right. Without using the term "neighborhood" which you apparently don't recognize, Dunbar since 1962 has had a geographic attendance zone, has it not?

A. It is my understanding that that is so, yes.

Q. And the geographic attendance zone for Dunbar is in the geographical area where the physical building exists, is it not?

A. In the sense that the building is located within the boundaries described, for the attendance area, that is true. The boundaries, of course, are very irregular and very considerable in their distance from the building.

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[R. I. 1116, Vol. 11] Q. Just to clear up that one point: Is it your testimony that you don't understand what is meant by the concept "neighborhood school", Dr. Carle?

A. I would understand it in a context, and I simply am searching for the context in which you are describing it. • • •

[R. I. 1120-1121, Vol. 11] Q. All right. Now, if you would refer to Joint Exhibit No. II.

I can give him my copy.

That is a position paper dated October 26, 1970, is it not, Dr. Carle?

A. Yes, it is.

Q. And it is a paper that was signed by each and every member of the school board as it then existed, isn't that right?

A. Yes.

Q. And it was a paper that was put out to the electorate in connection with the efforts of the school to obtain passage of an 8.5 million levy for the schools, isn't that right?

A. Yes, it is.

Q. And in that position paper the school board represented that the school board itself would not impose forced bussing during the term of its administration, isn't that right?

A. That is the statement, yes.

Q. And the members of the school board signing that paper are the same people who were on the school board in December of 1971, are they not?

A. It is my recollection that that is so, yes.

Q. Now, referring to Defendants' Exhibit BU, if you will.

While the Clerk is locating that exhibit, Dr. Carle, do you know what your school board meant when they used the term forced bussing" in that position paper?

A. No, sir. I was not a party — that position paper was not, I believe, part of any board meeting, and I was not party to the construction of it.

Q. Did you ever see the position paper back in October 1970?

A. Yes. It was made public through the press, as I recall.

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[R. I. 1123-1125, Vol. 11] A. Well, you are asking me the question in the context of the term formed bussing, and then you are asking me another question having to do with freedom of enrollment, and the two are not the same.

Q. Well, I am trying to understand what, if anything, you understood of what your Board was saying in this position paper.

A. I wouldn't have thought there was any connection between freedom of enrollment on one hand and the term forced bussing on the other hand since there was no transportation as far as the Board of Education was concerned involved in freedom of enrollment. There was transportation available to students in the district. For example, sizable areas in the northwest and southeast areas and students were given transportation. They were forced to attend those schools in the sense that those were the attendance regulations of the district, but that's why I say that term to me is so meaningless because wherever a student is assigned, if he is two miles or more from that destination in the case of the Dayton Schools a mile and a half, transportation is provided and generally welcomed.

Q. So I understand two things from what you have told me, Dr. Carle. First, that you consider that the term used by the Board in its position paper was meaningless; is that right?

A. No, sir. I testify, I think, to your questions. I don't recall your asking me whether it was meaningless.

Q. Well, I don't mean to get in all this repertoire with you, but I find it difficult to avoid, Mr. Carle. I asked you what your understanding of what the Board meant by that term in the position paper.

A. I don't think that's what you asked me, sir.

Q. Well, I am asking you now.

A. I think the term forced bussing was in the context that it was appearing in newspapers and in controversy at the time.

I don't think it has specific reference to practice in the Dayton Schools which you asked me about.

Q. You felt that their use of that term had no relation at all to the freedom of enrollment program which was then in effect in the Dayton School System?

A. I can't read Board of Education members' minds, but to me, I made no connection whatsoever with that policy.

Q. All right. Could you take a look at Defendants' Exhibit BU. That is a resolution.

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Q. That is a resolution that this same Board of Education that signed the position paper in October and existed in December of 1971 unanimously passed in January of 1971; isn't that right?

A. Yes, sir.

Q. And the unanimous resolution that was passed by also the members of the Board of Education in January of 1971 indicated that the Board sees no alternative to the neighborhood school, does it not?

A. That phrase is used, yes.

Q. On January 4 of 1971, did you understand what the Board meant by the phrase that saw no alternative to the neighborhood school?

A. Well, I don't recall what I thought at the time. I suppose I saw it in the same context that the other resolution arose.

Q. What other resolution are you referring to?

A. The statement that you referred to earlier. I had indictated in previous testimony that that grew out of reported negotiations between members of the Board with the problem of passing a school levy and that the price or whatever you want to assign to it for having unanimity for getting an issue on the ballot was that of a statement to that effect.

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[R. I. 1131-1135, Vol. 11] Q. And that was knowledge that was common to you and to the community and to other members of the school board in early November of 1971; isn't that true?

A. Insofar as that represented what had been reported in the press and elsewhere about positions taken by the political organization which several of them aligned with.

Q. And that would shift the majority of the school board from the 4-3 situation you had been working with in the year 1971 to a different 4-3 situation on these issues?

A. That possibility existed. I was aware, however, that individuals within that group, the group that you described, had made expressions that were not identical in terms of their understanding and their commitment to the concept you indicated and, indeed, I can think of at least one, perhaps two or more who had made statements supporting concepts of integration.

Q. Well, I am not talking about that, Dr. Carle. In fact, your board both before and after January of 1972 has been unanimously in that regard, have they not?

A. I couldn't say that that is so or not. I do know that the 1967 resolution committing the board to looking for racial balance to my knowledge has never been rescinded, so in that sense it is perhaps a continuing policy.

Q. Well, that was a unanimous resolution, wasn't it?

A. I was not with the district at that time, but I believe it probably was.

Q. Fine. The only things I am talking about are these two issues which I appreciate may not have meaning to you, but which have at least been defined as a neighborhood school issue and the issue you have forced bussing of students, and you were aware in November of 1971 that you would have at least four out of seven on the school board opposed to a removal of these attendance lines and opposed to involuntary bussing of students?

A. I am not and, Your Honor, I really do need to define the term because it is very important. I am trying to make it clear there was no way to anticipate the reaction of the successor board of education concept and I also want to make it clear that in my judgment there would be – if for example, the Foster Plan is a context in which you might be asking the question that the basic elements of the Foster Plan do come within what I understood to be positions of most of the members of the Board of Education, and I simply don't want to say that because there was literature and there was publicity that used those two terms that that necessarily specifically ruled out the possibility of any form of integration called by any other name or even by those names.

Q. I am sorry, Dr. Carle, but like Sweeney and Eliot's poems, I have got to use words when I talk to you, and if you don't understand my question, I will attempt to rephrase it. I am not talking about opposition to integration, and I think you would agree with me, would you not, that there are all sorts of devices to try and achieve an integration.

A. Yes.

Q. What I am talking about, and let me talk about them one at a time so that we can try to understand each other. You knew in November of 1971 after that election of Board members that by January 1972 you would have four people on that school board who were definitely opposed to the idea of eradicating all of these attendance districts that existed in the Dayton School System; isn't that right?

A. No, I didn't know that.

Q. All right.

A. I wouldn't say that the neighborhood school concept necessarily would be disharmonious with eradicating of boundaries since I believe that those who hold that concept do, indeed, approve of a certain district-wide or area-wide or different forms of attendance which might include changing of both boundaries.

Q. All right. Let me ask the question, or let me ask a different question.

You knew after the election in November of 1971 that by January of 1972 you would have four people on the School Board who had campaigned at one time or another, taken public positions at one time or another, where they said that they were strongly supportive of what they called the neighborhood school concept?

A. That's true.

Q. All right. Now, you were also aware of the election in 1971, that on January 1, 1972 you would have a four-man majority on your Board who had campaigned or taken public positions at one time or another, saying that they were opposed to what they defined as forced bussing of students, isn't that right?

A. In their terms, yes.

Q. All right. And I understand you didn't understand their terms?

A. I believe I indicated I understood a context, but that I felt that term itself was not very useful in describing school practices.

Q. Now, in view of the imminent change in the Board majority, did you have any discussions with the then Board President, Mr. Lucas, about an eleventh hour implementation of a plan to abandon school attendance lines and to adopt bussing of students against their will?

A. Well, I had a number of conversations with Mr. Lucas. I don't recall one based on any – for at least not on several of the terms that you used.

On December the 2nd, the Board had met and received the report of the Committee of 75, and I was asked by Mr. Lucas to assist in preparation of resolutions which would implement the recommendation of the Committee of 75 and complete the commitment which the Board began in April of 1972 by appointing the Committee and asking for its recommendations as far as racial isolation in the district was concerned.

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[R. I. 1140, Vol. 11] Q. All right. After this election, it became clear, did it not, that you would have the following four persons: Mr. Goodwin, who had just been elected, Mrs. Groff, Mr. Hart and Mr. Riddenour, who were all still on the Board, who would be the four who had taken these positions we have talked about concerning neighborhood schools and forced bussing?

A. Yes.

Q. Now, sometime in 1972 Mr. Riddenour died, isn't that true?

A. Yes.

Q. Just so we can get our scorecard correct.

And then the Probate Judge of Montgomery County appointed Mr. French, who was the former administrator of the school system as the new member of the School Board to take the place vacated by Mr. Riddenour's death?

A. Yes.

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[R. I. 1144-1146, Vol. 11) THE COURT: Mr. Greer, before you ask another question, let me direct an inquiry to you that is now commencing to trouble me.

I indicated I didn't wish to retry Brown, and I certainly don't want to retry Marberry vs. Madison, and I can see some aspects of it at this point.

Assume for just a moment that the Board on the day after election, those who had therefor been in the majority, met, and assume further that they specifically retained Mr. Lucas and that he joined them and they decided that specifically and directly they would be in office only until the end of the year, and that they were going to implement the Foster plan, and they directed Mr. Lucas to draft these resolutions; and let's assume that Dr. Carle agreed with them and encouraged it and assisted them. Let's assume all those things. Let's further assume that this was in direct defiance, if I may use that word at the moment, of the will of the electorate.

Does all of that have any significance, in view of the fact

that they were the legally constituted Board and they did have authority to do precisely that?

MR. GREER: I think it has significance only in this narrow context, your Honor, and that is that while they are the legally constituted authority, they certainly have the right to adopt any appropriate resolutions. In this case, where much is being made of the purported admissions in those resolutions, and in view of the Keys case and other cases, I think it's important to show the context in which they arose as an eleventh hour effort that was precipitous.

It wasn't the result of a long deliberation of the body. It was merely an attempt to do something before the situation changed.

THE COURT: Is it any the less the legal action of a duly constituted Board of Education?

MR. GREER: No, your Honor, I would say that it is not, nor is it right to reconsider it any different.

THE COURT: O. K. And so if I were personally, as an electorate of Dayton, enormously irritated at what they had done, can that be translated into a legal status wherein Keys, for example, or Bradley, is not applicable? Can this Court draw a distinction by saying, well, this was done in defiance of the will of the voters and therefore the Court will set it aside?

MR. GREER: I don't think in that context there is a distinction, but it seems to me that the cases do make a distinction on action which is taken precipitously at the expiration of a term, and that is all that I am attempting to show by these questions, that that is exactly what happened here, that the action was taken a month before they knew the majority would change, and it was just a hurry-up affair to try to gain a step on the parliamentary ladder.

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[R.I. 1150, Vol. 11) Q. Is this Monday afternoon session where Mr. Lucas the Board member, brought Mr. Lucas, the Plaintiffs' attorney, in this lawsuit?

A. Yes.

Q. Now, in your December 2 meeting with Mr. Lucas, the Board member, had he given you a draft of proposed resolutions or any other written material?

A. Oh, no. The Board met on that occasion to hear the report of the Committee of 75, and it was sometime after that, and my recollection is it would be over the weekend because I don't think we had put much on paper until Monday morning, as I recall.

Q. What meetings did you have with Mr. Lucas, the Board member, after the meeting?

A. Telephone calls, I think, exclusively.

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[R. I. 1160, Vol. 11) Q. This was at the meeting on December 6th?

A. Yes, sir. And I probably – I am certain that I was very well aware and very concerned about having the documents legally in harmony with the status of desegregation as it existed in the country at that time.

Q. At that meeting with Mr. Louis Lucas, or at any other meeting before the Board meeting of December 8, 1971, did you have any discussions or conversations with anyone concerning the tactical aspects of adopting such resolutions, and then having them rescinded?

A. The only specific reference I can recall is some mention of the status of litigation in Denver and perhaps – is Kalamazoo relevant? Perhaps those cases. I don't remember any other discussion along those lines.

Q. But the effects of adoption of the resolutions, and then later rescision of them, were discussed in the context of those cases prior to December 8th, weren't they?

A. I don't remember discussing it in that context, but that certainly was part of the legal literature at that time, and I'm sure it was discussed in the overview we were talking about. I wanted my Executive Committee to understand where we

were legally in desegregation at that point, if we could get a viewpoint on it from Mr. Lucas. I do remember that.

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[R. I. 1165, Vol. 11] Q. Well, the purpose of the December 16th meeting was to try to rule on the motion for reconsideration, which indeed was found to have been proper under the rules of order that govern the School Board proceedings, isn't that correct?

A. I think it was a little more complicated than that, but in substance that certainly was part of it.

Q. And then the December 16th meeting ran into a problem because of the problem of notice of the meeting, isn't that right?

A. Again, I think that was alleged, as I recall.

Q. And then they tried to have another meeting on December 30th, just before the year ran out, to correct that parliamentary problem, didn't they?

A. There had been a meeting scheduled for December 30th, and that meeting was held, yes.

Q. And that again ran into problems of notice to Board members, didn't it?

A. I don't have any recollection on that.

Q. Did you attend all three of the meetings that the Board held in December to try to get these resolutions resolved?

A. Yes.

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[R. I. 1174-1176, Vol. 11] Q. The December 8 resolutions were subjected to an immediate motion for reconsideration on December 8, weren't they?

A. There was such a motion made, yes.

Q. And there was a lot of parliamentary scurrying around at these other two meetings in December trying to clear up the resolutions before the year came to an end, wasn't there?

A. I would simply interpret that as the Board's wanting to make clear the intent of its action.

Q. And, of course, we have already gone over the elections and I don't want to go over that again, but the plan which you worked up with Dr. Foster involved a wiping away of all of the school attendance lines and an adoption of a bussing program that would involve the involuntary bussing of some 22,000 out of 50,000 students, did it not?

A. Before I answer that, I should like to just technically respond to the plan. It had nothing to do with wiping away boundaries. It did propose a different means of assignment, but there is nothing inherent in the plan that did away with boundaries. It was the Board's action on December 8 that did that. The method of assignment in the Foster Plan would have included the apparent option to accept transportation wherever assignment was at a distance longer than the existing policy for transportation within the district.

Q. Well, did it involve involuntary bussing of some 22,000 out of 50,000 students in the system?

A. There is an estimate that 22,000 or so pupils; that is, an increase from about 6,000 to 22,000 pupils would qualify for transportation, but there was nothing inherent in the plan to involuntarily bus them, no.

Q. Is it your understanding that in view of the fact that the resolutions of December 8 were pending on a motion for reconsideration that you had no authority to pursue those resolutions?

A. That would not have been my understanding, no. Well I don't know what you would mean by pursuing the resolutions. I don't regard myself as having done anything one way or the other that would – if you are talking about the Foster Plan, I obviously was free at any time to develop a plan.

Q. You weren't –

A. I don't think there is anything inherent in the resolutions that said I could or could not consult with Dr. Foster.

Q. You weren't developing the Foster plan as a result, then, of the resolutions of December 8?

A. I would say as a response to, but I don't think the reso-

lutions either required or prohibited me from taking any action that was taken.

Q. Now, you did not recommend the plan as such to the Board, did you?

A. That's correct.

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[R. I. 1182-1184, Vol. 11]. Q. And you also noted as a very positive thing for the Dayton School System that back in the year 1963 Dayton had been among the highest employers of blacks of any school system in the State?

A. Yes. I was not, of course, aware that they were employed only to teach black children.

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Q. In your statement to the Board of Education in August, 1968, Dr. Carle, you state to them, did you not, that "When the first Ohio Civil Rights Commission survey was made several years ago, I recall that the Dayton Schools were leaders in the employment of Negro teachers in the State, thus this is not a community that has been insensitive to the changing needs and demands of the Urban Center."

You made that statement, didn't you?

A. Yes, I did, Mr. Greer. I suspect that probably is in the same context that I noted in the deposition that Mr. French made, which I think is in evidence, that after three or four years here he was not aware that the swimming pools at Roosevelt high school were segregated, for example. Obviously I didn't have, after two months in the city, the kind of grasp that a year or two later I had of what really was going on in the Dayton Schools.

[R. I. 1188-1191, Vol. 11]. Q. Have you ever heard of Lloyd Lewis or of the Frontiers Club?

A. Yes, indeed.

Q. That is a black organization, isn't it, dedicated to improving the rights of its people?

A. I believe that is probably a fair characterization. I'm not totally sure of its purposes.

Q. And are you not aware that at the meeting of the Board, on Thursday, February 5, 1959, Lloyd Lewis, Sr., on behalf of the Frontiers Club of Dayton, made a citation to the Dayton School System which read in part that the –

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Q. The presentation reading in part, "The National Organization, Frontiers of America, through its various chapters, recognizes and awards a merit award to the organization in the local community which in the opinion of the members of the local chapter has done most for the promotion of brotherhood in the community. The members of the Dayton Chapter feel that the integration of school facilities in this community has been quite noteworthy and the progress has outdistanced all Ohio School Systems. Therefore, the Dayton Board of Education has been cited for the 1958 award."

You are not aware of that citation?

A. No.

Q. And you are not aware of the citation plaque that stands all by itself on the wall of the Board room of the Dayton Board of Education?

A. Well, I believe all the plaques that are there stand by themselves, but I have not been aware of that one in particular.

Q. How many plaques are there on the wall?

A. I only in my mind's eye can see several hanging on the wall. I would guess maybe three or more.

Q. In your address to the Board back in 1968, where you were citing to the Board your feel for the progress that it had made in efforts toward integration, you also pointed out, as a factor, open enrollment in all summer high schools centers that had been inaugurated in 1968, did you not?

A. Yes.

Q. And that was a program that permitted summer school

students from all over Dayton to mix together at different summer schools?

A. I believe there were perhaps three centers and some effort to specialize courses in those three centers. So there would be some interchange of students. I do not know how many or to what extent that actually occurred.

Q. Did you also cite that as a positive factor only because you were naive and unaware of life's harsh realities?

A. No. I think any of the citations that are honestly made reflect the typical white response to the black concerns of the time. Obviously, it is a very defensive paper and tends to cite rather limited measures none of which address the fundamental segregation of the schools district.

Q. And you also cited the fact that nine receiving schools would be more racially balanced with children from Edison and Jefferson where their elementary grown had necessitated transportation.

A. I thought that was a very positive development . Thus, I regretted the fact that we segregated back into the original schools two years later.

Q. And you also cited the fact that of the 319 teachers employed by mid-August for the 1968-69 school year, 29 percent are black; didn't you cite that?

A. Yes. That would be roughly comparable to the composition of the staff as a whole and frankly, would be anticipated. I noted as a personnel man in a large school district that the statistics from year to year tend to be about the same regardless of what you did. If you had about 30 percent blacks on the staff, you could expect those appointments.

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[R. I. 1207-1211, Vol. 11] Q. Are you aware that when Roth High School was opened – which was in 1959, wasn't it?

A. Yes.

Q. – that when Roth High School was opened, its student population turned out to be approximately 75 percent white and 25 percent black?

A. I think that's close to being what it would have been, yes.

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Q. Dr. Carle, I have put on the board a set of overlays showing the elementary school boundaries in the Dayton System as they existed in 1957, and then as they existed in 1970.

There have been a few changes in those boundaries during that entire period of time, isn't that correct?

A. Are you talking about just physical boundaries?

A. Yes.

A. Yes. That appears to be so.

Q. In fact, the only real changes that have been made even in some of the areas in western Dayton, for example, the Gardendale-Westwood, where the boundary of the more western school has taken away some of the territory of the eastern school as that school district became much more densely populated? Isn't that true?

A. Well, I wouldn't characterize that as a map indicating that change. I would have to put it in the context of the 1951 or so policy of the Board that there would be no more transfers, and then in that context, obviously many optional areas, and other options for attending schools, have continued to be practiced. So whether the boundary lines are the same or different, is relatively irrelevant to the actual effect on how schools become or are black or white today.

Q. All right. But you would agree with me that there are relatively few changes in boundary lines per se, would you not?

A. Well, except that there are a whale of a lot of optional areas. There is just no visible reason for all of that meandering of boundaries.

Q. All right. Now, during this period where the actual boundaries did not change substantially, and I not correct that in the '51 period up to 1970 Fairport School has changed from a zero black population to a black population of 59.1 percent in this school year?

A. I'm sure that you are quoting from the statistics on the exhibit.

Q. Well, without trying to pin you down, I will appreciate that you can't keep these in your mind much better than I can keep them in mine, but there has been that change in the composition of student body of the school without any change in the boundary, isn't that right?

A. No. There has been a change in the boundary of Fairport in that it became in 1971 a feeder school to feeder schools in the Daytonview area.

Q. All right. Now, the Grace Greene School over this area has changed without a substantial change in boundaries, an almost white school to an almost black school, has it not?

A. Well, again I recall that we asked Dr. Charles Glatt to prepare maps when we were going into the middle school planning to determine the race and location of all children in relation to where they were attending school, and I recall asking him, why, when he put red dots for black children and blue dots for white children throughout the 5th and 6th and 7th grades, to indicate then what the populations would be in the 6th, 7th and 8th grades, that there were within the green district, where the school is virtually all black, blue dots indicating white children residing there. And I asked him how could that be, and he indicated that cards – that is, we asked the schools to fill out a card for each child for that purpose with their race, the grade level and the name of the child, and he said that the cards showed their attendance to be Van Cleve and Longfellow, and of course, at that time they were almost all white.

So when you asked me what the history of Greene is in relation to its boundaries, I just had to say that I can't explain totally from the boundary what the racial composition of that school was.

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[R. I. 1221-1227, Vol. 12] Q. Well, without looking at the little map that's up in the right-hand corner, we have established that Mad River Township is an area to the east and northeast of the city limits of Dayton, haven't we?

A. Yes.

Q. And the high schools most accessible to that east side of the city are Kiser, Wilbur Wright and Stivers, are they not?

A. I don't see that that has any bearing, since they were already on board, and the distances probably were no greater than those being used to send black students to Dunbar at the time anyway.

Q. Well, let me rephrase my question. The three high schools to which these students were sent were geographically located closer to Mad River Township than any other high schools in the System, weren't they?

A. I would say that that geographically is so. I think it needs to be understood that we are talking here about inner district transfer. These students were not residents of the city school district of Dayton, and were admitted to the district by Board action and contract, and therefore there is no relation to any existing boundaries within the Dayton School District.

THE COURT: Dr. Carle, would you have not taken them to the closest schools?

THE WITNESS: Well, I think the issue at the time, your Honor, was that there was not space for high school students at Mad River. When it became apparent, that is, the study that is in evidence, as I interpret it, became apparent that there would not be room at Wilbur Wright and Kiser and Stivers to continue serving those students. I'm simply saying that to my knowledge there was no consideration of housing them at Roosevelt or Roth – Roth was not in existence then. Well, perhaps it was, the later years – and Dunbar, and if space were available there, it would be just as appropriate to house the students in those schools as in the ones that were alleged to be without space.

THE COURT: And it would be your position that the Board's failure to do that is evidence of segregation?

THE WITNESS: Well, it certainly fits the pattern that has been pervasive down through the years, that no white students, regardless of from where they came, or the purpose, were assigned to black schools.

Q. There was available space in the '50's then at Kiser and Wilbur Wright and Stivers to house these students without a high school, wasn't there?

A. The studies that I saw indicated that in the latter part of the '50's this space was inadequate and therefore Mad River would have to be notified that some years hence, I assume three or four years hence, they would have to make provision for their own pupils because these schools would not have room.

Q. Well, Mad River did build a high school, didn't it, in the late '50's?

A. I assume pursuant to that notification they then undertook to house their own students.

Q. And Kiser especially was a school and is a school that historically has had an undercapacity enrollment of students, isn't it?

A. Well, I don't know about historically. It has never been a large school. It was not designed as a high school, and hence it has been a small school.

The only reference I have is to the study which indicated that given the number of pupils, and I think it was perhaps five or six hundred or more, being transported into the city school districts from Mad River, they were being phased out of those three schools because the space would be needed within the school district in those schools.

Q. Do you have any knowledge at all, Dr. Carle, as to whether they was available capacity in any Dayton High Schools other than Kiser, Wilbur Wright and Stivers in that period of the late '50's with the possible exception of Patterson?

A. I note that there is a study of enrollments in high schools, I believe, for 1957, which would be about the time that the

decision on those three schools was being made, and by rule of thumb it would appear that Dunbar, for example, would be among other schools that would have room for at least some of the students.

Q. How many?

A. I don't know that there is adequate information other than the rule of thumb. I suppose comparing it with the room availability indicated, or the room numbers in other buildings, something between 100 and 200, perhaps could have been housed at Dunbar, using the figures of that study that year.

Q. This program, however you characterize it, was phased out at the end of 1950, was it not?

A. I don't know the exact year. The study, I believe, showed enrollment through the latter part of the '50's, and I don't know the terminal date, although I assume it would have been perhaps the first year or two of the '60's.

Q. And just so I will understand your testimony, are you characterizing this practice in the late '50's of putting Mad River Township students in the three schools geographically closest to that area as being somehow improper on the part of the Board of Education?

A. I say it is indicative of practice of not considering the assignment of white students to black schools.

Q. Now, yesterday you cited to us three examples that you indicated were the examples you knew of of students not being assigned to the closest school, those being Dunbar, the Shawn Acres situation, and the Veterans Administration situation.

Do you recall that?

A. Yes.

Q. Other than the subjective field that you described yourself as having as an administrator and the information as to some 7th and 8th grade students from adjacent schools who attended 7th and 8th grade at Dunbar, you would have to admit, would you not, that Dunbar was a city-wide optional school up until 1962?

A. Well, I testified to the 1933 policy making Dunbar an open enrollment school for junior high age. I am not sure of the other Board actions that would have similarly affected the other grades. There are, of course, Board actions terminating that. I believe, however, that it is evidenced that the operation of Dunbar was not simply as an open enrollment school but rather one which had many, many overtones from the prevailing practices in the district and that, as a matter of fact, a self-respecting black student, unless he were an exceptional student in another school almost inevitably when to Dunbar.

Q. By his own choice, wasn't it, for whatever reasons?

A. I wouldn't characterize that as a choice.

Q. Only because of extreme fixed factors that affected the choice, is that how I am to understand your answer?

A. Well, let me illustrate it this way: I remember your talking earlier about the Springfield or Smithville Area of the City. I was knocking on doors on a Saturday morning, I recall, and was surprised to meet the mother of Bing Davis, one of our outstanding teachers. So, I know very well where the Davises have lived over a good many years in the district.

Q. You mean Springfield Street rather than Smithville Road?

A. Yes, Springfield Street. Being apparently regarded as an outstanding high school student as he was a teacher later in the schools, he went to Wilbur Wright. His brother was assigned to Dunbar and was not kept at Wilbur Wright, and I have heard of other instances similarly in which even members in the same family were assigned to different schools. In Bing's case, his brother was not regarded as being the same kind of scholar that he was.

Q. Do you know of nothing other than hearsay to indicate that Bing Davis's brother couldn't go to Wilbur Wright if he had elected to do so?

A. Well, obviously all I know about anything prior to 1968 is hearsay, Mr. Greer.

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[R. I. 1242-1244, Vol. 12] Q. Now, before Carlson Elementary School was built in 1958, that whole area where Carlson exists was an optional area between Jackson and Residence Park School District, was it not? Perhaps I should point to that on our map.

I am pointing to the Carlson School District.

A. Right.

Q. That school was not built until 1958, was it?

A. That would be approximately the year, yes.

Q. And if we look at our overlays between '57 and '70, we can see that the Carlson Area before the school was built was optional to Jackson on the east and Residence Park on the north, isn't that true?

A. Yes, that's true.

Q. Now, let me refer you, if I might, to Defendants' Exhibits CO and CP.

Is it not correct, Dr. Carle, that the records of the school system for the period from 1957 to 1972 indicate that no children living at the Veterans Administration Center ever attended Jackson Elementary School?

A. Defendants' Exhibit CO lists students from Residence Park and the other one from Jackson School, and the statement is that from the years 1957 to 1972 there were no children in either of those schools from the Veterans Administration Center.

Q. I don't think you are reading them correctly. I'm only asking you as to Jackson. The records indicate that there are no children during that entire period from the Veterans Administration Center that ever went to Jackson, isn't that right?

A. Well, the heading indicates the years 1957 to '72.

Q. Right, which it would be in 1958 when Carlson was built, and that was no longer an optional zone between Jackson and Residence Park, wasn't it?

A. All right.

Q. So during that period, all the way up to the present time, no child of anyone living at the Veterans Administration

Center at least according to the records of the school system, ever attended Jackson School, isn't that true?

A. That is what this exhibit, I think, purports to say, yes.

Q. All right.

A. And if we look to Residence Park, which is to the north of that area, the records do disclose that during that entire period, from 1957 all the way up to 1972, a total of 48 children for that 15 years of whom eight were black children living at the Veterans Administration did attend Residence Park?

A. Yes.

Q. And do we not also know from the information that your office has developed that by the year 1963 at least all three of the schools that are involved here, Carlson, Jackson and Residence Park, were 80 percent or more black in their student composition?

A. After 1963?

Q. Well, let me pull back from that question.

We have records of the student compositions in 1951 and '52, and then we don't have any up until 1963, isn't that right?

A. I think there are records in '54, and then not until '63.

Q. So that the earliest date we can pick between '57 and the present —

A. I'm sorry. I said '54. '51, I think you said, and I think that is correct. 47 to 51, yes.

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[R. I. 1250-1266, Vol. 12] Q. All right. Perhaps I didn't make my question clear. I was really asking, and I thought your testimony yesterday was concerned with an earlier period than the Christian Science Monitor was referring to in 1968 and 1969.

A. I don't think it was, particularly. I think I was just indicating a reputation of a school that seemed desirable.

Q. Well, quoting to one side the Christian Science Monitor and trying to get back to what I recall of your direct testimony yesterday, I thought you had indicated a period of time in the

'50's or '40's that the enrollment at Patterson Cooperative was filled with white students?

A. Yes, I believe that was the testimony.

Q. It was an optional school city-wide at the time, was it not?

A. Students elected to go there, yes.

Q. And before giving that testimony on direct examination, did you make any investigation to determine whether that school was really filled to capacity or whether there weren't a lot of available openings at that school during that entire period?

A. No, I don't recall either making such an investigation or particularly being aware one way or another. The only investigation that was asked in this suit that I was aware of had to do with the assignment of pupils to the school and, particularly, the racial characteristics of the school.

Q. Did you make any attempt to ascertain how may white students from, say, Roosevelt High School were attending Patterson Co-op, or Roosevelt School District were attending Patterson Cooperative High Schol at any given period of time?

A. Yes. I think that is an exhibit.

Q. And there were only 48 or 51 students from the entire Roosevelt area at Patterson Co-op back in 1948, weren't there?

A. I believe that figure appears on that chart.

Q. And by the 1967-'68 school year which was before you arrived on the scene, the enrollment of Patterson Cooperative High School was 12.8 percent black, wasn't it?

If you can again refer to Defendants' Exhibit AR, I think it will be helpful for you to keep with you for the rest of these questions.

A. I believe you asked for the year 1967, and that was 12.8 percent.

Q. Now, over the years and in operating a school where a student was on the job for two weeks and in school for two weeks, it was necessary for the school to be able to place that student in a job in order for him to participate in the program, wasn't it?

A. That was the practice, yes.

Q. All right. Let's get on the the HEW material. According to Plaintiffs' Exhibit 11-F, as I understand it, there was a voluntary agreement of the Board which settled the finding of probable noncompliance with HEW regulations that was made with respect to the staff of the School System; isn't that correct?

A. My testimony was that there was a letter finding the district to be in noncompliance, and the Board did adopt a resolution, two resolutions relative to resolving it.

Q. And it did that rather than going through the administrative hearings which it could have done to challenge the finding; isn't that correct?

A. Well, that would certainly be one of the alternatives, I would think, yes.

Q. Referring to page 2 of Plaintiffs' Exhibit 11-F which is a letter to you from HEW dated October 14, 1972, the third paragraph indicates, does it not, that in agreeing to desegregate voluntarily, the Board waived its opportunity for an administrative hearing on this office's finding of probable noncompliance?

A. Yes.

Q. And as I understand it, the only change that was ever made in the voluntary agreement was the setting of a specific date for that action with respect to the staff?

A. Yes. After the original resolution, it was required that a date be affixed to it, and that was done, I believe, two or three months later.

Q. All right, and the conditions noted by HEW with respect to Roosevelt High School were all taken care of and rectified by expenditures by the Board, were they not?

A. Well, all expenditures are by the Board. Are you asking the source of funds for various programs that were cited at Roosevelt?

Q. No. I am not interested where the money came from, and I don't think anybody in this hearing is, but expenditures were made to rectify those conditions?

A. Yes. Often Board funds are identified as local funds and tax funds are identified differently.

Q. The other matter concerning HEW as to which you testified was a matter involving transfers of white students from Roth High School and transfers of black students from Stivers High School; isn't that correct?

A. Yes.

Q. And those were special transfers that were made by the Board in situations of great stress; isn't that right?

A. I think that characterizes it well.

Q. If I could refer you to Plaintiffs' Exhibit 11-D –

Q. The Stivers situation arose, did it not, Dr. Carle, after an attempt was made to bring black students into Stivers High School by making a boundary change so that the Stivers boundaries went across the Miami River to include two predominantly black elementary schools?

A. Yes, that boundary change was made.

THE COURT: At what time, Mr. Greer? May I have that?

THE WITNESS: I believe that would have been for the fall of 1969.

Q. All right, and the Board's reason in making that boundary change was to try to add black students to the student population of Stivers High School, wasn't it?

A. One consequence of the action, yes. I testified that the boundary was expanded in balloon fashion, that is, east, south and west, and one consequence of that was that black students in the Irving and Whittier area were included in those changes.

Q. And that was by design rather than just happy coincidence, wasn't it?

A. I think one has to view the setting in which Stivers existed at that time. It had been through several years of decline because of the expressway construction, housing removal and urban renewal, and a school that perhaps had 1400 pupils at one time was down to perhaps 700 or less, and the expansion of boundaries made a more viable school for Stivers

by increasing the number of students attending the school. I think it is now perhaps up in the range of 1250, 1500 or more pupils.

Q. All right. The thing that really cut down the student population of Stivers was the extension of Route 35 from Xenia all the way through the Stivers district to where it interchanges with I-75; isn't that right?

A. That certainly was a major factor.

Q. That took large chunks of neighborhoods right off the map, didn't it?

A. Yes.

Q. And so Stivers was in a position where capacity-wise it could handle many more students than were actually available in the old attendance district?

A. Yes, that had been evident for about a decade and no one had really examined the boundaries to deal with it.

Q. Well, it has only been a few years that Route 35 has been completed, hasn't it?

A. Well, the property acquisition and the urban renewal measures dated back some years into the '60's.

Q. All right, but at any rate in the decision that became effective in the fall of 1969 to expand the Stivers attendance district to bring more students into that school, the decision was made that in expanding the boundaries, the attendance district would cross the Miami River and take in, I think it was, the Irving and Whittier elementary zones; is that right?

A. Yes, part of those zones.

Q. After Stivers became populated with black students, there were riots and demonstrations and a good many difficulties at Stivers; isn't that right?

A. Would you give me the time you are talking about? Are you talking about just the opening of that school year?

Q. I am trying to lead up to Plaintiffs' Exhibit 11-D and try to explain for the Court why black students from Stivers were temporarily assigned somewhere and why white students from Roth were temporarily assigned somewhere else .

• • •

Q. Immediately before or in the period immediately before the transfer of students from Stivers and from Roth, there were demonstrations, were there not?

A. That had been true for some period of time in the Roth area, and I believe in the Stivers area it had to do with an incident in which a group of blacks left the building and subsequently were not reassigned or some of them at least were not reassigned to the building.

Q. Were there periods where either of these schools had to be closed?

A. There had been at Roth. There had not been at Stivers at that point, as I recall.

Q. And Exhibit 11-D was a letter written by you on February 20, 1970 to Mr. Henderson of the Department of Health, Education and Welfare who had raised a question concerning these temporary transfers; is that right?

A. Yes.

Q. And in that letter, you informed him that 34 black students were transferred from Stivers at their parents' request and after individual conferences with the pupil personnal department. They were given temporary assignments to Roosevelt or Dunbar with the understanding that the assignments would be reviewed at a later date; is that correct?

A. Yes.

Q. And you also informed him that there were 36 white students at Roth High School who were transferred to other high schools, some of them integrated but most of them predominantly white, and that the transfers were made at parental requests and after psychological study of the allegations that injury or harrassment was interfering with the learning process?

A. Yes.

Q. And you also indicated that 40 black students remained at Stivers and 18 white students remained at Roth.

A. Yes.

Q. And you went on in that letter, did you not, to explain that the reason for these temporary transfers was for the individual good of the students and that you thought it was

necessary to do this to avoid interruption in the continuity of their instruction?

A. Yes.

Q. And you also pointed out that you had determined that in the absence of explicit educational reasons to the contrary, all of these students would be reassigned to their school attendance areas of residence beginning with the September 1970 semester?

A. Yes.

Q. And then in the last paragraph, you expressed yourself as follows to the Department of Health, Education and Welfare: "I appreciate your concern about forces and actions that contribute to increased racial isolation. I regret, however, that neither your office nor other Federal agencies including the Department of Justice that were invited to observe last fall found it expedient to express concern at that time or to lend direct assistance to reducing racial polarity and separatist pressure."

A. Yes.

Q. And that was an honest feeling on your part, I am sure, wasn't it?

A. I think that's a pretty good summary. I had indicated that the city at the time I came here was reaching a peak of tension and that factors in operating schools were very, very difficult.

Q. And you feel confident, do you not, that the transfers that were made during that period of heated controversy were justified for educational reasons?

A. It depends on whether one uses limited reason or the broader educational reason. They were restrictive to the broader educational purpose because they again reinforced and repeated the separation of white to white schools and black to black schools and reinforced the notion that when races are in small minorities in a community which has a substantial minority in a school, it is very difficult to maintain a viable situation.

Q. Well, Dr. Carle, these are facts, unfortunate facts of

life which we all recognize and your policy back at this time with the two sets of students was a temporary transfer for their own physical and mental health until a cooling off period had occurred, wasn't it?

A. Yes.

Q. And you would do the same thing today if demonstrations and physical violence occurred, wouldn't you?

A. I would probably be forced to, Mr. Greer, given the facts that we haven't changed the basic situation that segregates the schools.

Q. So am I right that you don't characterize your action in connection with these 34 black students from Stivers and 36 white students from Roth as a racially motivated action or a segregationist policy of the Board?

A. I would characterize them as totally racists in that they were necessitated within the frame of a situation that required or forced or resulted in a decision based on racial characteristics.

Q. The racial problem that existed was a problem of the student community rather than of the Board of Education, wasn't it?

A. I don't see how, as an executive officer of the Board of Education, I can ignore the community, because the children are the community.

Q. I don't ask you to ignore the community, and I wouldn't expect anyone to, but my inquiry was on a more narrow basis.

The violence and threats of violence that led up to these transfers were not violence or threat of violence that members of the Board of Education were permitting on the grounds of Roth or Stivers High School, were they?

A. Not incidents, but the Board had control over the conditions that led to that kind of activity.

Q. Dr. Carle, on February 20 of 1970, when you appended the letter that we have as Plaintiffs' Exhibit 11-D, you felt that the complaint of HEW concerning the assignment or temporary assignment of these black and white students for

their own physical and mental health was completely unjustified, didn't you?

A. Not completely unjustified, since I admitted the result of it and corrected it, but I did attempt to explain it, yes.

Q. Well, it had been your intention all along that these were going to be temporary transfers and that you would put the students back as soon as the environment was such that they could complete their learning process which was the reason for having them in the school, is that right?

A. I think that is substantially so, yes.

Q. Didn't I detect a little note of complaint or dismay that the temporary transfer was questioned in the last paragraph of your letter?

A. Well, the last paragraph, I think, was saying it is easy to criticize if you are not a part of the problem and that schools desperately need help of the agencies that apparently were reviewing the situation.

Q. Sometimes the war looks different to the Generals than it does to the people in the trenches, doesn't it?

A. I haven't been a General, so I don't know.

Q. You felt it looked different when you were in the trench back there in February of 1970, didn't you?

A. Definitely.

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Q. At any rate, you were in the trenches in February of 1970, and if you were back in the trenches you would have to do the same thing again on temporary transfer of students, wouldn't you, if you felt their own mental and physical health and safety required it?

A. Well, I have found contrary to the texts I had in educational administration that almost every situation that arises these days seems to have different characteristics, so I don't know whether I would have the same circumstances and would take the same actions, but certainly I can't minimize the factors that were existing then.

Q. If you had another situation such as you had at Roth

and Stivers today, would you leave those children in the situation?

A. The reason I am pausing is that we do have situations comparable. I think other things have been attempted to try to intercept, and one certainly has to place the safety of students very high on the list of considerations if there were an emergency.

Q. But you don't feel that in 1970, or in the fall of 1969 — I'm sorry — that you were acting in a racist manner or the Board was acting in a racist manner in doing what you thought was best for the health, safety, educational experience of these children, did you?

A. I think the response was racist in that it was defined by a racist situation and was limited by the experience that a segregated system and staff had to deal with it. In that sense the results had to be racist and the actions I think have to be viewed as racist. There is no way to separate the racial factors from the action and the results.

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[R. I. 1274-1284, Vol. 12] Q. If we are talking about maintaining a precise mathematical ratio in each school, isn't that almost a physical impossibility?

A. I am not talking about maintaining a precise ratio. I am simply indicating the separation was so great that in some cases the movement that was made was not totally in conformance with the agreed district characteristics of 70-30 which was the original dimension and that my recollection was that where exceptions occurred, they tended to be in the direction of the former imbalance.

Q. You can recall giving a deposition for Mr. Diamond after this suit was filed on June 19 of 1972 in your own office, can you not, Dr. Carle?

A. Yes.

Q. And referring to Page 5, Pages 4 and 5 of that deposition, can you recall stating as follows in response to a question from Mr. Diamond:

"ANSWER: As the result of those initial activities, the desegregation of staff was undertaken and essentially completed this last fall, the fall of 1971."

A. Yes, I recall saying that.

Q. And you were under oath, of course, at the time you made that statement, were you not?

A. Surely.

Q. That was a correct statement, was it not?

A. Yes. I used the term essentially, and obviously I am referring to the fact that there still is exceptions to that, however minor they might be. I was emphasizing the fact where those exceptions occurred, they occurred in that direction.

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Q. To rephrase my question, it is true by the fall of 1971 the staff desegregation in the Dayton School System was essentially completed; isn't that right, Dr. Carle?

A. Yes. If I could just try to define that a little bit, I was noticing for the current year, number of staff instead of being 70-30, it was 41 or 42 or something of that sort. It is that kind of exception I am talking about.

Q. Are you referring to Defendants' Exhibit AM?

A. I don't have an exhibit in my hand. I have a compilation.

Q. If you have those statistics, you are able to tell us, are you not, that by the 1971-72 school year most of the schools in the system had a teaching faculty that was between 30 and 40 percent black?

A. I think that's a fair characterization.

Q. Three and a half years ago, back in 1969, the Dayton School System was tops in the State of Ohio in employment of black educators generally, was it not?

A. In relation to the percentage of pupils in the districts, I believe that we did report in that manner, yes.

Q. Do you as Superintendent of the Schools publish a little magazine or leaflet called "School Day."?

A. Yes. I believe that those figures were given in School Day.

Q. All right. If I could refere you to Defendants' Exhibit AQ.

Q. Do you recall an issue of School Day that you put out on April 21, 1969 after you had been with the system for almost three years?

A. Yes, have it in hand.

Q. And that came from your office, didn't it?

A. Yes.

Q. Under your authorship?

A. Yes.

Q. And the big capitals were "Dayton Schools Record Highest in Employment of Negros Educators," wasn't it?

A. Yes.

Q. By this time in the space of almost two years, you had had a chance to find out what the assignment patterns of teachers in your own system were, hadn't you?

A. Yes.

Q. And you started off your article by saying that Dayton is a City of Employment Opportunity for Negro Educators, didn't you?

A. Yes.

Q. That was true, wasn't it?

A. Yes.

Q. And you indicated that a district-by-district survey made by the State Board of Education disclosed that Dayton ranked No. 1 in the State of Ohio in the proportion of Negro teachers to Negro pupils and the proportion of Negro administrators to Negro pupils; isn't that correct?

A. Yes.

Q. You had the best record in the State in 1969, didn't you?

A. Yes. This follows up the earlier comments I made about the employment of teachers. This, of course, has no relationship to assignment.

Q. And you also pointed out that Dayton ranked second in the State in the proportion of total teaching staff that was black in 1969?

A. Yes.

O. And also ranked second again in the total percent of black administrators?

A. Yes. You indicated that before.

Q. However, while it ranked second in those departments, you also pointed out that if you look at the pupil percentages, Dayton had nearly a 3 to 5 ratio of administrators to pupils while the leading city in the State had a ratio of only 2 to 5.

A. Yes.

Q. You also pointed out, did you not, that Dayton employs three times the percentage of Negro teachers as the average of the 20 largest districts and four times the percentage of administrators?

A. Yes.

Q. And that is a record of which you were justly proud, is it not?

A. I think it is a good record in employment, yes.

Q. It is the same kind of thing you were referring to in your address when you first came to your present job as to the record that the school system had achieved in 1963; isn't that right?

A. Yes, in general, it is. The administrative characteristics of course, had changed considerably by this time.

Q. In your article of April 21, 1969, you didn't undercut the praise by any disparaging remarks about the system, did you?

A. Well, I think the article stands for itself. I don't know whether it undercut or not. I suppose it would depend on how you view the article. There was no intention to undercut anything, no.

Q. Referring you, if I might to Defendants' Exhibit AO, that is an exhibit prepared by your office showing counsellor assignments in the Dayton School System by racial identity, is it not, Dr. Carle?

A. Yes, it is.

Q. And it shows that as of the present time to counsellor

assignments are divided in an essentially equal manner among all schools in the system; isn't that right?

A. Yes.

Q. In other words, it is broken down as to the percentage of black counsellors assigned to predominantly black schools, black counsellors assigned to predominantly white schools, white counsellors assigned to predominantly white schools, and white counsellors assigned to predominantly black schools; isn't that right?

A. Yes, it is.

Q. And the percentages vary only from 38.9 percent to 62 percent in those categories; isn't that true?

A. That appears to be so, yes.

Q. Well, it doesn't just appear to be so on this piece of paper. It appears to be so in the system of the Dayton Schools, doesn't it?

A. I just meant that the figures in this column appear to be what you have represented.

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Q. The figures that were prepared by your office in making this exhibit do actually reflect the situation that existed in the Dayton School System, don't they?

A. I think they represent what is on this table, and I think they are accurate with respect to the categories listed on this table.

Q. That really isn't my question. I want to make sure and have you affirm for me, Dr. Carle, that the figures shown on this table actually do represent the number of black counsellors that are in white or black schools and the number of white counsellors that are in white or black schools.

A. This is my understanding, yes.

Q. Now, let me refer you to Defendants' Exhibit AM.

Q. Using that to refresh your recollection, if necessary, Dr. Carle, am I not correct that by the 1971-72 school year, 26 of the 74 elementary principals and assistant principals in the Dayton School System were black?

A. I am just about caught up with you. I have a figure 26 and what I am looking for is 74. Can you help me out? In what column is that?

Q. It would be a matter of adding up the total figures, wouldn't it? They still teach that old fashioned subject, don't they?

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A. Well, at any rate it sounds as if what you say is correct. I just can't find the 74, and I am sorry I am not with it on which columns are relating to which figures here right fast, but that sounds as if it is a substantially correct representation.

Q. And then by 1971-72, 13 of 32 high school principals and assistant principals in the system were black; isn't that right?

A. Yes. As I mentally add that row, yes.

Q. And by going through this Exhibit, we can find out just who was where as far as race is concerned at each school in the system?

A. Yes.

Q. Then, if we turn to Defendants' Exhibit AL, this is an exhibit that your office prepared at our request showing a summary of the racial composition of staff by composition of student body in the Dayton City School for the years 1968 through 1973; isn't that right?

A. Yes, these are correct figures.

Q. And it indicates that by 1972-73 there were five situations where Negro principals were assistants in schools having 50 percent or more white student population; isn't that right?

A. Yes, it does.

Q. And it also indicates an integrated administrative staff in schools 50 percent or more white student population in 15 schools?

A. Yes.

Q. Do you know what your staff was referring to when they used integrated staff in that compilation?

A. I believe that you gave them the headings for the columns and I assume they mean by that two races in the

school or two races in the staff, I should say.

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[R. I. 1291-1292, Vol. 12] Q. Those are largely jobs that are held by Union employees, are they not?

A. The largest group in that category would be members of the buildings trades union, yes.

Q. And am I not correct that in October of this year, the Dayton School Board has adopted resolutions recommending two unions and an apprenticeship program that would increase the number of black individuals available in that category of the job positions?

A. You are substantially correct. It isn't quite that simple. There was a long negotiation with the Unions which is embodied now in a proposed master agreement and it would for the first time provide for free apprentice and apprentice position that were not open to the Board of Education previously.

A. All right. And except through negotiations such as that, the Board of Education has no control over the membership of any Unions with which it has to deal, does it?

A. Again, it is a complicated factor involving both Civil Service and Union apprenticeships, and you are correct that that particular area of employment is the most difficult one.

Q. Referring you to Plaintiffs' Exhibit 42.

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Q. That exhibit shows the background by school and type of job of the nonteaching personnel that we have just been talking about, doesn't it?

A. This is a little more complicated form than the previous ones, and I have not reviewed it, so I will take your word for it because you weren't right in previous ones.

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[R. I. 1295-1299, Vol. 13] Q. Dr. Carle, when hunger and fatigue called us away, I was referring you to Plaintiffs' Exhibit 42, was I not?

A. Yes, you were, and with the delight of the evening meal – well, here it is.

Q. This exhibit represents the distribution of the non-teaching personnel throughout the school system, does it not?

A. Yes, sir.

Q. By school and by type of employment?

A. Yes, and by race.

Q. And without going into great detail with this greatly detailed exhibit, it shows that there is a fairly wide distribution of black and white personnel throughout the school system in this category, does it not?

A. There is distribution, yes.

Q. All right. Now, it was on December 19 of 1969, was it not, that the school board adopted its statement of intention that each school staff throughout the entire Dayton School District would have the racial composition that would reflect the total staff of the district as a whole?

A. You are asking about the date of completion or the date of adoption?

Q. The date of adoption.

A. December of 1969, is that the date?

Q. December 19 of 1969.

A. Yes, I believe it was the date on which the date of completion was adopted. I assume that was your question.

Q. All right. And as of December 19, when the Board adopted that plan for integration of the entire staff, the following strides had already been made, had they not? The first, by December 19 of 1969 every teaching staff in the entire district was integrated to some extent?

A. I believe that would have been the result of efforts from the previous spring through that time, and I believe that would be so, yes.

Q. And by December 19, 1969, out of all 50 high schools and 53 out of 58 faculties, a favorable racial balance had been achieved, is that right?

A. That sounds like a statement from that period, yes.

Q. And by December 19, 1969, the movement toward city-wide racial composition had been significant in many schools, had it not?

A. You are still talking about faculty?

Q. Yes.

A. Yes, in the sense that there had been some movement in each building, I think, by that time.

Q. And as of December 19, 1969, of the six chief executive officers, 33 percent were black; of a hundred directors and supervisors, 29 percent were black; and of all central office administrators, 25 percent were black, isn't that right?

A. That sounds as if it would be so for that period, yes.

Q. And by December 19, 1969, when the Board adopted the resolution to which we have referred, of all the principals and assistant principals in the system, 30 percent were black, isn't that correct?

A. That sounds as if it would be a correct figure for that time, yes.

Q. At that time, of all of the administrative staff, 28 percent were black?

A. I believe that would be so for about that time.

Q. And by that time, eight of the eleven high schools had integrated administrative staffs?

A. That also sounds as if it would be characteristic of that time.

Q. And by December 19, 1969, ten of the twenty-three elementary schools that have more than one administrator had integrated administrations?

A. Yes, I believe so.

Q. By December 19, 1969, three Negro principals had been assigned to predominantly white schools?

A. I should think that would be so, yes.

Q. And by December 19, 1969, ten white principals had been assigned to predominantly black schools?

A. I would think that would be so.

Q. And of the new teachers employed for the 1969-'70 school year, 28 percent were black, which brought the city-

wide percentage of Negro staff members to 29.4 percent, is that not correct?

A. That would sound about right for the '69-'70 school year, yes.

Q. Now, let's turn topic of conversation for awhile to the schools in the Dayton System.

Let me first clear up a couple of points.

Garfield School is no longer an elementary school, is it?

A. No. Garfield is used now as a manpower training center.

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[R. I. 1302-1303, Vol. 13] Q. And in September of 1962, the Hawthorne Elementary District was made optional between Kiser which had extra space and Colonel White High School, was it not?

A. I don't know that Kiser had extra space or that the space relationship between the two schools was different.

Q. Do you know the date that this optional zone was created?

A. I don't recollect it offhand, no, sir.

Q. The record that you have or that your office has put together for this case indicate that September of 1962 was the date, do they not?

A. I just don't recollect. There are lots of records in exhibits at this point.

Q. Now, referring you to Defendants' Exhibit AR, the percentages of the student compositions at Kiser and Colonel White High School in 1963 which is the first year after 1951-52 for which we have figures show that the black composition of the student body of Kiser High School was 2.7 percent while the black composition of the student body of Colonel White was only 1.1 percent, does it not?

A. Those are the percentages listed, yes.

Q. That would be as of 1963?

A. Yes.

Q. And that is the 1963-64 school year?

A. Yes.

Q. The residents of the optional area between Kiser and Colonel White were predominantly white, were they not?

A. Yes.

Q. And five years after that option was created, the black population of Colonel White High School as far as student body is concerned was still only 8.4 percent black; isn't that right?

A. You are referring to 1967?

Q. Yes.

A. Yes, Colonel White was 8.4 percent.

Q. Now, we have already talked this morning about Stivers High School.

THE COURT: Excuse me, Mr. Greer. May I ask for that same year what was the black population percentage of Kiser?

THE WITNESS: Kiser is less than 1. percent. It is .9 of 1 percent.

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[R. I. 1306-1310, Vol. 13] THE COURT: Was there ever a time that Dayton did not also have the schools with kindergarten through eight? I hope I am not confusing you. Assuming that there was a time when there were junior high schools as well, was this an optional situation or could a student go kindergarten through eight and then go to high school?

THE WITNESS: I am not able to say. There was a change in the early forties, perhaps 1941 that reinstituted or at least instituted the 8-4 system. Now, there undoubtedly was a period in which there were junior high schools. Whether they were for all areas of the city, I am not sure.

THE COURT: But since that time the 8-4 system has been in effect?

THE WITNESS: Since the early forties, the 8-4 system has been in effect.

THE COURT: The middle schools were never intended to replace junior high schools?

THE WITNESS: No.

THE COURT: You may proceed.

O. There are five middle schools that were created in September 1971; am I not correct?

A. Yes.

Q. And have I referred you to Exhibit AW?

A. Yes.

Q. The attendance areas which surround MacFarlane and Whittier middle schools are predominantly populated by black people; is that not correct?

A. Yes, that's correct.

Q. Some degree of mixing of black and white population was achieved at the Orville Wright and Cornell Heights middle schools; is that not correct?

A. A small amount of mixing in part of the Orville Wright area and a disproportionate mixing in the Cornell Heights area.

Q. Included in the Orville Wright area were Franklin and Kemp Elementary Schools which had no black students in 1970 and 1971, isn't that correct?

A. Yes.

Q. And also included in the Orville Wright middle school area was Washington Elementary School which had 16.4 percent black student body composition in 1970 and 1971?

A. Yes.

Q. And Washington is the school that we have described that includes that Springfield Street area?

A. Yes.

Q. Going to Cornell Heights, that middle school included Fairport Elementary School which had a 9.7 black student population in the 1970 and 1971 school year?

A. Yes.

Q. And it also included Jefferson Primary and Jefferson Elementary which had predominantly black student populations in that year?

A. Yes.

Q. The Longfellow Middle School is the last of the five, isn't it?

A. It is the last one listed on that page, yes.

Q. And it included three former elementary schools; Longfellow, Van Cleve, and Hawthorne; is that not true?

A. Yes.

Q. Longfellow in 1970-'71 had a black student body composition of 53.9 percent?

A. Yes.

Q. Van Cleve had a black student body composition of only 2.1 percent; is that right?

A. Yes.

Q. And Hawthorne had a black student body composition in 1970-71 of zero?

A. That's correct.

Q. So, those three schools then, are mixed together in grades 6 through 8 at what is now Longfellow Middle School, is that correct?

A. Yes.

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[R. I. 1320-1329, Vol. 13] Q. So that there was only a month or so left of the 1967-'68 school year for those pupils?

A. Perhaps a month and a half, I would gather.

Q. Now, you were not present at the meeting of school administrators that took place on the Monday after the Edison fire, were you?

A. No, I was not.

Q. And you didn't mean to imply in your direct testimony that the administrators, including Mr. Goff and Mr. Harewood, who met on the Monday after the fire, didn't plan to assimilate those students into regular classes at the start of the next fall year, did you?

A. I don't believe I have the information one way or the other on that.

Q. All right. Then you wouldn't imply that it wasn't the intention of the administrators to assimilate those children when the next school year started, would you?

A. I recall Mr. Harewood saying that the reason they were

assimilated was that I had directed that that be done in the summer of 1968.

Q. And those students that were assimilated into these various white schools to which they were transferred after the fire remained students of those schools until their graduation, did they not?

A. There could have been students who remained until graduation. There may have been, for example, students who were in the seventh or eighth – by graduation, you mean moving out of the elementary school?

Q. That's the only way you get out of an elementary school, isn't it?

A. Well, we do not have a graduation in the elementary schools, but they would have been students who were close to leaving the elementary school, I believe, who were transferred, and there may be others who have elected to remain in the receiving school and indeed have left schools after having remained in under freedom of enrollment.

Q. All right. But at least as far as the policy adopted by the Board in that fire situation, the students were assimilated in the schools and remained there unless they graduated or transferred under freedom of enrollment or something of that nature.

A. No. The assignments which were made to the other schools were reassigned to the Edison and MacFarlane areas when those boundaries were set up as middle schools.

Q. All right. The only thing that would change it would be the setting up of middle schools in 1971?

A. Yes. That constituted the return of the students who had been assigned to the other schools.

Q. All right. And I assume that some of the '68 students by that time had passed through elementary school and some were still in elementary school?

A. I would assume so. I don't happen to recall specifically which grades would be where at that time.

Q. Now, let me refer you to Defendants' Exhibit BA.

Q. This exhibit is a summary, is it not, of the transfers that were made as a result of overcrowding situations?

A. These are students from Jefferson, Westwood, and then the Edison ones would have been the fire situation.

Q. Jefferson and Westwood were overcrowding and Edison was the fire situation?

A. It is late in the evening, Mr. Greer, and I would like to reserve judgment on the Westwood situation. We were dealing at that time the fact the eighth grades at Westwood were still contained in Roosevelt and Roth High Schools. There have been considerable controversy over the fact the eighth year had been assigned to those high schools and this may have been involved in that adjustment.

Q. All right. Well, let's talk about the Jefferson situation which is what you discussed in your direct examination.

A. Yes.

Q. Those were temporary transfers made because of overcrowding conditions at Jefferson School; isn't that right?

A. Yes.

Q. And that situation stopped in September of 1971 because the overcrowding problem was resolved by the creation of the middle schools at that time; isn't that correct?

A. It was possible to reassign to the total buildings in that complex, yes.

Q. During the period that the transportation of the students existed from the '69-'70 year until the middle schools were created and resolved the problem, eight receiving schools were involved; isn't that right?

A. Yes.

Q. And all of those receiving schools were predominantly white schools; weren't they?

A. Yes.

Q. As I understand it, the first year the students were transferred, an entire class would be transferred to one of these receiving schools?

A. Yes.

Q. And the number of students involved were up to 81 students in the Valerie condition, weren't they?

A. Yes, both Valerie and Meadowdale had considerable space on the perimeter of the City at that time.

Q. So, the result was that you would have one class in, say, Valerie School or any of these other schools that would have a lot more students than the other classes in those schools?

A. I wouldn't say that there were more, but there would be a sizeable number in a class, yes.

Q. Can you give me any specific examples? Let's take Valerie School. Do you know what class from Jefferson was transferred to Valerie?

A. I am sorry but I don't have those data before me, and my recollection wouldn't be good enough at this point.

Q. But at any rate, the reason in the second year of this program you switched from a class transfer to a district or a block transfer out of the Jefferson area was to distribute children throughout the classes in the receiving school rather than to lump them all into one class at the receiving school?

A. Yes. I indicated that both in terms of the sending parents who felt in some cases some students had been in adjustment more than their share because of the grade level selected and sensitivity on the other end that there were more black students in some classes than parents thought was desirable.

Q. But when you changed from a class transfer to a district transfer, the students transferred from Jefferson were still approximately 80 percent black students, weren't they?

A. Yes. It had increased in that period, but that is approximately the proportion, and, of course, as you have indicated, they were from all grade levels at that point.

Q. Now, let me change the subject to the subject of capacities of school buildings. You would agree with me, would you not, that there were many factors involved in estimating pupil capacities of any given school building?

A. I think that there certainly are a number of criteria that might be used, yes.

Q. As I understand it, the Dayton public school surveys are based on square footage; in other words, an average number of students per square foot in classrooms per day?

A. Essentially, that is correct.

Q. As I understand it, the Dayton Public surveys use a standard of 30 square feet per person versus the City Code, which is 20 square feet per person versus the State Code which is 40 square feet per person.

A. That was the basis of one calculation, yes, sir.

Q. And the Ohio State University survey on capacities is based on a pupil-teacher ratio as opposed to square footage, is it not?

A. I am not sure that that describes – it may have been a pupil-teacher ratio in relation to rooms available, perhaps.

Q. Don't they use one teacher to 28 pupils per classroom?

A. I believe that would be the standard they used.

Q. And am I also correct that the Dayton teachers have insisted on a ratio of one teacher to 25 pupils per classroom?

A. Well, I am not aware of that. I know that teachers everywhere insist on as low a teacher-pupil ratio as possible, and 25 seems to be a goal that is mentioned often around the country. I don't know that that particular figure has been bantered around in Dayton more or less, but I am sure there are teachers who would hold that position.

Q. Do you know of any teachers who find it irrelevant whether there are 25 or 50 students per teacher per classroom?

A. Well, I think you are referring to earlier testimony that research doesn't relate class size to class achievement, and as to what various teachers think about that research finding, I don't know. I would think a typical teacher would want as few pupils as would be assigned.

Q. And is the reason for that laziness or is it because they feel it is more effective?

A. Well, I am sure if you were asking a teacher to justify that point of view, the teacher would say, "The fewer pupils I have, the more individual attention I can give to the pupil,

and if I could have my way, I would be Mark Hopkins and teach to one pupil on the other side of the log."

Q. Let's turn that subject to my next question which is that none of these surveys whether they are based on square footage or pupil-teacher ratio take into consideration the curriculum which is offered, do they?

A. I wouldn't say that none of them do. There is an effort, as I recall, in the tables to indicate that, for example, gymnasium space was included in the calculation because gymnasiums are used for classes each period in the day, but I think auditoriums, for example, were not included because they are not used routinely for class space. I am not sure as to what attention was given specifically to laboratories although I noted in a table there was reference to pupil stations in areas such as vocational or shop classes.

Q. Obviously an industrial arts class or a science class with laboratory equipment you need more square footage to accommodate both pupils and equipment; isn't that true?

A. Yes. Normally you discuss this in terms of pupil stations.

Q. And even in purely academic subjects where all you need is a teacher, a desk, some paper and pencils, the size of the classes vary, do they not, so that there may be a small number of pupils in the room due to the subject matter that is being taught?

A. Well, since you evidenced little relationship to present teaching arithmetic a little earlier, I would say that doesn't characterize the academic subject any more. There is more than a desk and a teacher and paper to teach academic subjects, so there may be indeed other kinds of equipment today that wouldn't have been true earlier, but in general a lecture-type class will require less space than a shop type class.

Q. Well, leaving aside my ignorance of modern education, is it not true that the size of classes varies? For example, if you have a school that is teaching fourth year Latin, you may have a small number of pupils in each class session as opposed to an elementary course in American History where presumably everyone in a certain grade level will be attending.

A. Yes. Of course, that becomes very expensive, and an administrative decision has to be made as to whether a school program can afford to continue classes, let's say, that are fewer than a dozen pupils. One routine that is sometimes used is to teach multi-level courses such as first and second year Latin within the same class period, so that isn't automatically a limiting factor, but indeed that does occur, and if there are classes with limited enrollment and if there is no alternative to assigning them to a room, then it ties up a room that may be suitable for 35 for only a dozen.

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[R. I. 1336-1339, Vol. 13] Q. But regardless of who proposed it, it was the Dayton Board of Education that adopted it, and that was the date that it was adopted, is that not correct?

A. I believe that's the date. I don't have it before me.

Q. The policy has three priorities, does it not, and I think we are all familiar with those under the evidence.

I understand from your direct examination that you have proposed, and the Board hasn't disposed, to eliminate the second priority, is that correct?

A. That's correct.

Q. And that priority is a priority for strictly educational purposes, is it not?

A. The second priority?

Q. Yes.

A. Is for course selection in another school, yes.

Q. And, of course, that priority is open to blacks as well as whites, is it not?

A. Yes.

Q. And it, like the other aspects of this plan, is operated on a first-come, first-serve basis?

A. I would say substantially that is correct, yes.

Q. You referred to that in your direct testimony as the escape hatch of course selection.

Is that the way you characterize it?

A. Yes, I would characterize it that way.

Q. Aren't there any courses offered in certain schools which are not available in other schools?

A. Yes, obviously. For example, Patterson is an example of that. But I think the reason that the staff was concerned about this, and my executive committee, as I recall, discussed this on several occasions, and noted that the students who were availing themselves of this option were nearly invariably white and transferring to white schools, and this indicated to them that there was more operating than just course selection.

Q. Were there no blacks attempting to attend different schools to receive special courses that they couldn't obtain in their own neighborhood schools?

A. I believe there were. I don't have those statistics before me, but I believe they are an exhibit.

Q. Out of the 1,063 students which are or who are presently attending schools other than their own neighborhood schools under the freedom of enrollment, only 60 students are non-minority students, isn't that correct?

A. That's correct.

Q. Now, if I might refere you to — before I do that, the freedom of enrollment policy was modified on January 3 of this year to provide free transportation, wasn't it?

A. Yes, sir.

Q. Now, let me refer you to Defendants' Exhibit AD through I.

Referring first to Defendants' Exhibit AG.

A. I think it is here.

Yes, sir.

Q. This is a report of freedom of enrollment programs statistics for '69-70 and '70-71; isn't that correct?

A. Yes.

Q. And this, as similar exhibits, simply reflect approvals or disapprovals that year rather than the total students attending under the program, isn't that true?

A. That's my understanding, that this would reflect the applications actually handled for the year given.

[R. I. 1353, Vol. 13] A. With the notable exceptions I have given, there has been considerable effort to desegregate the staffs, yes.

Q. And in the present school year, at least as far as the records available indicate, only 184 students out of a total student body of over 50,000 students were unable to attend the school of their choice because of the lack of classroom space?

A. Within the context of the prior testimony on that, yes.

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[R. I. 1355-1357, Vol. 13] Q. I show you Plaintiffs' Exhibit PX-5A. With reference to the assignment of both black and white teachers, new hires and transfers, could you give me what PX-5A shows with relationship to their racial assignment?

A. For 1968-'69 only?

Q. Yes.

A. It shows that Negro teachers assigned to schools with predominantly white enrollment numbered 40 and white teachers assigned to the same white schools numbered 223, and Negro teachers assigned to schools with predominantly Negro enrollment numbered 95, and white teachers assigned to schools with predominantly Negro enrollment numbered 64.

Q. Now, these are teachers; is that correct?

A. These are teachers.

Q. And is this the kind of study that later developed by which you became aware of the continuing extent of the factulty segregation?

A. Yes, it is obvious in terms of the new hires and transfers for that year the predominating pattern was the assignment of black teachers to black schools and white teachers to white schools.

Q. Now, you testified that you hired a certain number of black principals over that first summer you were here.

A. Yes.

Q. And then you assigned all principals in all schools for the fall; is that correct?

A. Yes.

Q. And did you for the first time assign a black teacher out of West Dayton?

A. A black administrator.

Q. Black administrator, I beg your pardon.

A. Yes, across the Miami River.

Q. And did that single assignment eradicate the pattern of identifying schools as black or white by the assignment of administrators?

A. By no means.

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Q. Now, with respect to PX42 about which reference has been made on cross-examination, could you tell me what PX42 is?

A. This is the assignment of non-teaching personnel by categories and schools and race.

Q. Now, you testified on cross-examination that there was a distribution on a racial basis in the school system.

A. Yes.

Q. Could you tell me what that distribution is?

A. In the high schools, for example, the assignment of non-teaching personnel alone would identify the school as white or black with respect to its pupil enrollment.

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[R. I. 2107-2111, Vol. 20] Q. Are you aware of instances or practices of the State Department of Education whereby accreditation or chartering of particular schools or school districts has been withheld or threatened to be withheld by the State Department of Education?

A. Yes. At the time that I joined the Department, the Legislature had just required that all districts of both elementary and high school – there were about 50 elementary districts – that were in the process of being notified of the necessity to join with another district in order to remain chartered. There was a reduction in the number of school districts for each of the years that I was in the school district by consolidation, and in some of those cases, this would be the result of inspection of schools unable to meet minimum state standards, and therefore required to be consolidated with another district.

Q. In general, Doctor, if a school district did not meet State educational criteria, or if a particular school did not meet educational criteria, the State Board of Education had the power to revoke the charter, is that correct?

A. That's correct.

Q. Or to fail to grant a charter?

A. Yes.

Q. Would its failure to provide equal educational opportunity be greatly dissimilar of its failure to provide other educational opportunities in your opinion?

A. No. Indeed, in the opinion of the Attorney General, that was a definition of the law, that the State Board and the State of Ohio were required to report them.

Q. That was the 1956 Attorney General opinion that has been referred to already in this cause?

A. Yes.

Q. And the State Board for various educational reasons did so act, is that correct?

A. Yes.

Q. Now, with reference to any particular city-wide schools, did it act in that regard?

A. Indeed, in the creation – well, let me state just for city-wide schools and discuss a situation in Middletown, Ohio, where an exception was asked with respect to the construction of a new school and the proposed chartering of that school which would have resulted in two high schools in the city, one predominantly white and one predominantly black.

The request was that the schools be chartered as one institution on two campuses so that all students would go to

both schools and therefore both institutions would be integrated, and such was approved.

Q. If they had been chartered separately, then they would have been segregated schools? They would have each had all the grades, is that correct?

A. That's correct.

Q. So the State Board did in effect adjust, which might be a word that could be used, its accreditation criteria in such a way as to set up a pairing of schools in effect, is that correct?

A. That's correct.

Q. With regard to the State Department of Education's advice to the Dayton Board that its present middle school plan was racially in violation of desegregation requirements, did the State Board take action under their authority to deny accreditation to those schools?

A. No.

Q. Could they have done so?

A. In my judgment, under the premise of the Attorney General's opinion referred to earlier, yes.

Q. And under the practices which they engaged in, you were setting up in effect a new school, were you not?

A. Yes.

Q. And you made Whittier, for example, a middle school? That was a new school that had to be chartered separately or differently?

A. With the exception that the law in 1966 provided as I think I testified earlier, to the fact that school districts are now chartered in toto, so that this was not a chartering matter, but it still is a matter of meeting minimum standards regardless. The whole district, in other words, is liable, not just a single building.

Or to put it another way, if a single building is not in compliance with the requirements of the State, then the whole district is in effect liable to lose its charter.

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[R. I. 2135-36, Vol. 20] [Following is proferred testimony of Wayne M. Carle] A. Metropolitan Dayton. I think it was 52,000 were going to school by bus and perhaps four to five thousand as far as the public school pupils are concerned were within the city and the rest would be outside the city.

Q. Now, a lot of those would be in rural areas or what, heavily urbanized areas?

A. All of the metropolitan area would certainly have to be regarded as urbanized. There are conditions within the Dayton School District that are identical to those that would exist in many of the suburban areas. For example, the City of Kettering or the City of Oakwood, when we are driving down the street between Dayton and Oakwood, there is no difference other than the corporation sign or difference in the spacing of the housing of the schools. On the other hand, we have some areas within the school district that would be characteristic of some more suburban areas; that is, the area in the Meadowdale or Belmont area would have some characteristics like those of unincorporated or perhaps more peripheral areas of the metropolitan region.

Q. Now, you mentioned Meadowdale. How many pupils do you transport at Meadowdale?

A. At the high school level, something over 850 pupils are transported to Meadowdale High School. There is also transportation to some of the elementary schools in the same area. This would include, for example, Meadowdale Elementary where approximately 85 pupils are transported. There are other schools, you understand, in that cluster of schools in which there is also transportation. I just gave an example.

Q. Do you transport children to Lewton School?

A. Yes, Lewton is in the far east side of the district and something over 400 pupils are transported on what we call D-contracts. That is, parent transportation is provided.

Q. Many of those are Board owned buses?

A. Yes. To maximize the efficiency of the small number of Board owned buses, they are concentrated at one area of the city, largely in the east.

Q. Fairview High School, does it have some students transported to it?

A. Yes, Fairview has in the range of 300 pupils transported.

Q. Belmont?

A. Belmont has had a large number of pupils, something in the range of 680 or more.

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[End of proffered testimony of Wayne M. Carle]

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[R. I. 1374, Vol. 14] Q. Dr. Carle, are optional zones a sound administrative device for assigning pupils to schools?

A. I wouldn't characterize them as useful, no.

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T. TESTIMONY OF LLOYD LEWIS, SR.

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[R. I. 1383-1385, Vol. 14] Q. If you know how they were assigned, tell me the source of your knowledge.

A. If you were a student in Garfield or Willard, it was automatic. In my case, my children were in Wogaman. We could apply for other schools.

Q. You say you could apply for –

A. My children stayed in Wogaman. That was it, in that case.

Q. All right. When they came to high school age, do you know where their records were sent at that time?

A. Automatically they were sent to Dunbar.

Q. All right. And did your children attend Dunbar?

A. No. I applied for Roosevelt.

Q. And you say you applied. Did you ask that there be a transfer of your children to Roosevelt?

A. Yes.

Q. But your children's records were sent to Dunbar, is that correct?

A. I have no knowledge of where they were sent. I was aware of that fact, and I saw to it that they went to Roosevelt.

Q. So you asked for a transfer to Dunbar from Roosevelt?

A. To Roosevelt.

Q. In working with the students in the community, did you also work with teachers in the schools?

A. Yes.

Q. All right. Were you familiar with the general practice to the assignment from Dunbar from your work in the community?

A. Yes.

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Q. From your work in the community, did you have knowledge in general of how black children got to Dunbar?

A. Yes.

Q. And how was that?

A. Automatically they were sent if they were black. See, that was the design of the school, the same as Christian Atticus in Indianapolis.

Q. Were you a member, sir, of an organization called Frontiers?

A. I was.

Q. Did you hold some positions within the organization?

A. I was Chairman at one time.

Q. All right. Are you familiar with any actions taken by the Frontiers, vis-a-vis the Dayton Board of Education with respect to integration of schools?

A. I was.

Q. And had that organization called upon the Dayton Board to take action in that regard?

A. I don't understand the question.

Q. Had the Frontiers asked, demanded or what-have-you, that the Dayton Board of Education take steps toward integration of the Schools?

A. Definitely.
Q. All right.

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[R. I. 1389-1390, Vol. 14] Q. And when were your own children in Wogaman Elementary School, Mr. Lewis?
A. It must have been in the year – they went to high school in '40, so you would have to go back about eight years.
Q. So it would be in the late '30's?
A. Early '30's.
Q. Early '30's?
A. Yes.
Q. And at that time was Wogaman essentially an all black elementary school?
A. No. Wogaman had integrated.
Q. Do you have any idea of what the composition of the student body of Wogaman was back at that time?
A. It was largely white at that time.
Q. All right. And you asked that your children go to Roosevelt High School, and that's where they went, isn't that correct?
A. In 1940, right.
Q. Now, I think you have indicated that you don't know where the records for your own children were sent after they completed their elementary education, isn't that correct?
A. That's correct.

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U. TESTIMONY OF GORDON FOSTER.

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[R. I. 1395, Vol. 14] Q. Dr. Foster, in connection with your teaching at Miami of Ohio, did you have occasion to work in any of the schools in the Dayton City School System?
A. Fairly extensively in this general area, the Metropolitan area. I supervised student teachers for three years, I think.

I think during that time it was all – well, not all but many of the districts in this area, particularly Kettering and I can't remember whether I had any in the City of Dayton or not, but in this general area I got fairly familiar with schools. I taught extension classes for the University at Roth High School, I believe, for two years, and then at Wright State for a year when they opened that facility and transferred the extension classes over there.
Q. You say you taught at Roth. That was at night?
A. They had evening and afternoon classes both. I believe mine were in the late afternoon, and I have also taught extension classes in connection with some of the suburban schools. Trotwood, for example, is one I can think of, and in connection with my duties at Miami University for a period of four or five years, I worked quite a bit with Dr. Purdy in the Bureau of Educational Field Services and did quite a bit of work in this general area in studying school district education.

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[R. I. 1396-1401, Vol. 14] A. Well, I have been progressively Assistant Professor of Education, Associate Professor and currently full Professor of Education. I was Chairman of what would amount to the Department of Educational Administration. I am not currently, but I was for about three years Director of a Federally funded program to train administrators for multi-cultural schools under the Educational Professional Development Act. In our case, it was primarily, although not completely, for black administrators in the southeast part of the country. I have been an Associate Director and for the past four years, I believe, Director of a Federally funded program, the Florida School Desegregation Consulting Center which is funded under Title IV of the Civil Rights Act to assist the schools in Florida in problems and matters of desegregation.
Q. That's the Civil Rights Act of 1964?
A. That's correct, sir.

Q. Dr. Foster, have you published in the field of education and in the field of desegregation?

A. I have, yes.

Q. Can you give us just a few on the list of your major publications?

A. Most recently in desegregation, I had an article in September in the Urban Review on urban desegregation. I currently am negotiating with the Harvard Education Review on an article again on urban desegregation which is in draft form and should be published, I believe, in May although that is still not decided. I have been either editor or coauthor or contributor to a large number of desegregation studies both in Florida and around the country. Some of these are under Title IV and the desegregation center in Florida. Others are under different banners. I have also been author or editor or contributor to many what we call school survey studies or reports. I did work, as I have stated, for the Bureau of Educational Field Services with Dr. Purdy of Miami. I have done several studies with Dr. Einman who has been with the State Department who also worked there. I worked for the Associated Educational Consultants in Pittsburgh for three or four years and worked on several studies in the State of Pennsylvania for them of a like nature.

Q. Are you author of any part of a book dealing with education in the State of Ohio?

A. Contributor of a chapter on the law and curriculum in a book edited by Dr. Simpson who used to be at Miami in Ohio published by the Andersen Company in Cincinnati.

Q. What is the title of that work?

A. I have it in my vitae.

MR. GREER: Ohio and School Law.

THE WITNESS: Ohio and School Law. It is sort of a layman's paperback for teachers and so forth.

BY MR. LUCAS:

Q. Dr. Foster, I assume your vitae will reflect membership in usual educational and professional associations; is that correct?

A. I believe it does, yes.

Q. What desegregation studies have you shared major responsibility for?

A. Well, quite a few. If I could break those down into sort of different types, as Associate Director of the Desegregation Center in Florida, the Center was involved in almost all of the court cases in Florida desegregation. Florida has 67 districts which are really county districts. They are coterminus with the co-political boundaries and I don't know the exact number, but I think about 40 of those have been through court order or are currently under court order. The Center was involved in almost all of those especially the big city ones, and we were also involved in several studies in connection with HEW compliance under Title VI – it is now called the Office of Civil Rights – when they were involved negotiating more than now with the different systems as far as compliance.

Then, as a private consultant for different organizations and growth, I have been involved in several cases some of which I have been an expert witness and some of which I haven't. The ones in which I have been a court witness have been Spanger vs. Pasadena in which I was a consultant for the Justice Department. I didn't appear in court, but I worked on the Houston Desegregation case for the Justice Department. I was a consultant for the United Steel Workers in Cisneros vs. Corpus Christi.

Q. Excuse me, Dr. Foster. Let me make it clear. Was I involved in any of those three cases?

A. Not that I remember, no.

Q. Thank you. You were retained by the United States Department of Justice in those cases?

A. That's right.

Q. Except in Cisneros, and in Cisneros you were employed by whom?

A. Actualy a law firm in Houston, but the United Steel Workers footed the bill for the plaintiffs. They were the ones that supported the suit, and in Mississippi I was in the Marshall County case.

Q. Was that for private plaintiffs in that case?

A. I believe that was the legal defense fund.

Q. And you were associated with that?

A. I was, yes. Holly Springs, I believe, was also part of that same suit. Holly Springs was a separate district.

Then, also in Mississippi the Humphries County case was not so much, I believe, as I remember it, a pupil assignment case. It was assignment by testing case.

Q. Was that with the Department of Justice?

A. I believe so, yes.

Q. All right.

A. I can't remember for sure whether that was a legal defense fund. I think the Department of Justice. Then, in Virginia in the Petersberg case I was a witness for the court paid under court order by the City of Petersberg. I was an expert witness for the Legal Defense Fund in the Richmond case, Bradley vs. Richmond case. It was not the metropolitan part but the original suit. I was witness for the Justice Department in the Norfolk case, Brewer vs. Norfolk. Well, it changed but I think at the time I was in it it was Brewer.

Q. It was.

A. And in Carolina County case in Virginia, I think for the NAACP – no, for the legal defense fund.

Q. And most recently, were you involved in the Detroit litigation?

A. I have also been involved with the NAACP in the Detroit litigation. I was also involved in Memphis is Earthcross vs. Memphis as an expert witness, and this past summer I spent six or seven weeks in Detroit and in Lansing working as a member of the Roth panel on metropolitan desegregation and in that case paid by the State Department of Michigan.

Q. Have you been appointed as a court expert in any case involving school construction?

A. Well, in several cases – would you say that again?

Q. Was there any case where the Court or the title for a center appointed you with respect to school construction in Florida?

A. Well, the Court in Jacksonville or Duval, Jackson vs. Duval County case appointed the center to make a detailed study in which building was involved, construction was involved and, of course, in almost every case construction is involved to some degree.

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[R. I. 1402, Vol. 14] Q. Dr. Foster, you were the author or supervisor of the preparation of the plan of desegregation for the City of Dayton; is that correct?

A. That's correct.

Q. In connection with the separation of that plan, can you tell me how much time you spent in Dayton?

A. As I remember it, I had one person working with me on that, Mr. McDonald, now Dr. McDonald, and the two of us spent a total of something like 11 or 12 days in the city plus a good deal of time in Miami, but actually on site, I think it was 11 or 12 days, and I spent all but – well, I think all but four of those days. I spent seven or eight days on site at that time.

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[R. I. 1419-1420, Vol. 14] Q. All right. You listed optional attendance zones.

Is there any relationship between those two?

A. Yes, sir. Very similar. It is partly a semantic situation. But when you have an optional zone, in almost every case it has to be carved out of one of the two zones in which it is optional, one of the two attendance areas in which it is optional, and therefore it automatically becomes a sort of dual zone or, as you will, an overlapping zone.

Q. Dr. Foster, have you at our request studied the pattern of new construction in the Dayton School System?

A. Yes, I have. When you say new, what I have studied primarily is, from 1950 to the present.

Q. What has been your observations of the facts of the pattern of school construction, new school construction in Dayton, from 1950 to the present?

A. May I refer to my notes?

Q. Yes, please.

A. In making an analysis of new construction from 1950 to the present, I have before me Plaintiffs' Exhibit No. 4 and also the overlay PX-53A, which had to do with new construction and additions.

I made a slightly different analysis than the one presented in PX-4, in that I carried it through to figures for 1972-'73, whereas if I'm not mistaken PX-4 used attendance figures for last year, for the '71-'72 year.

What I found in new construction was, to summarize briefly, there were 24 schools opened from 1950 to the present. Out of the 24, 22 opened at 90 percent or more black or white. That is to say, only two of the 24 schools opened as facilities without being either 90 percent white or 90 percent black.

Of that 22, I found that seven schools opened 90 percent or more black and remained so today.

Most of them are at either the 99 percent or 100 percent black level.

Six of the schools opened at 90 percent or more white and remained so today, and of the 22, nine schools opened at 90 percent or more white, and today these nine schools range from something like 17.7 percent to 96.7 percent black.

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[R. I. 1422-1423, Vol. 14] Q. In response to the Court's inquiry, Dr. Foster, you did say it does have something to do with segregation?

A. That's correct.

Q. Does it have something to do with school segregation?

A. Yes, sir, in my opinion.

Q. Dr. Foster, in counting the schools for new construction, did you count, for example, the Jefferson Primary as a new school?

A. I believe I did, yes, sir.

Q. And the same would be true for the other primary units?

A. Yes, but I think there was one case that was sort of questionable and that was Allen Primary which in some document is listed as a primary unit and in some merely as an addition to Allen. In my data I counted it as an addition rather than as a separate unit.

I believe it has the same administration addition in the regular unit.

Q. All right. Can you identify for me the seven schools which opened 90 percent or more black and remain so today.

A. All right. Residence Park Primary opened in 1966 at 96.5 percent black, and in 1972 it was a hundred percent black.

McNary Park opened at 100 percent black in 1964 and is still a hundred percent black.

Jackson Primary opened in 1960 at 99.9 percent black and is currently 99.7 percent black.

The new Dunbar High School opened in 1963 at 92.7 percent black and is currently 100 percent black.

The Carlson Elementary School opened in 1958 at 95 percent black and is currently 99 percent black.

The Louise Troy facility opened in 1957 at 100 percent black and is 99.1 percent black in 1972.

Miami Chapel, which is adjacent to the Louise Troy facility, opened in 1953 at 100 percent black and is currently 99.8 percent black.

These percentage figures at opening, I took from Plaintiffs' Exhibit PX-4, for the most part, and in some cases, I believe,

or I think in all cases, they are substantially correct. There may be a percentage point or so deviation.

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[R. I. 1425-1428, Vol. 14] THE COURT: Let me put the question to you another way. Do you build schools where the children are or do you build schools where you think the children should be? That is, do you build the school someplace else because it is a nonsegregated neighborhood and then transport the children there, or do you build them where the children are?

THE WITNESS: Well, I think school systems have done both.

THE COURT: Yes. I understand. But I would like you to relate it to the Dayton situation.

The schools you have named are in an area that is predominantely black and has been, according to the census tracts, for quite some time.

I ask you again, would you build schools there or would you build them someplace else and move the children to the schools?

THE WITNESS: Well, in terms of desegregation I would consider very seriously not building them where the children are but considering other possibilities of site selection, because I think that in building them where the children are the Dayton System has managed to lock in and compact both the school population and the residential population in the inner city, and at the same time to promote housing segregation and school segregation in the far-flung suburbs.

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BY MR. LUCAS:

Q. Dr. Foster, would you identify the six schools which opened 90 percent or more white and remain so today?

A. All right. These would be Shoup Mill, which opened in 1958, 100 percent white, now 3.8 percent; Belmont High School —

Q. Excuse me. 3.8 percent black, is that correct?

A. I'm sorry. 3.8 percent black.

Belmont High School, which opened no percent black and is currently 5.2 percent.

MR. GREER: While we are giving those, I suppose we ought to have the dates. 1956?

A. (Continuing) I'm sorry. Belmont was 1956 and Shoup Mill was 1958.

Meadowdale Elementary in '57, which opened no percent black, and is currently no percent black; Horace Mann Elementary, opening in 1954 at no percent black and is currently 3.1 percent black; Orville Wright opening in '52 at no percent black and currently 8.1 percent black; and Eastmont opening in 1955 at no percent black and currently 0.7 percent black.

Was that six?

MR. LUCAS: I think so, Doctor.

THE COURT: Yes.

BY MR. LUCAS:

Q. Directing your attention to Meadowdale High School, is it just slightly over the ten percent figure you used?

A. My data give it at 10.6 percent black this year.

Q. And it opened at 0 percent?

A. That's correct.

Q. And Belle Haven?

A. Belle Haven opened in 1954 at 0 percent black and is currently 17.7 percent black.

Q. Dr. Foster, turning your attention now to the building additions. Did you examine those?

A. Yes, I did, sir.

Q. Will you give us the results of your examination?

A. All right. Again, in compiling these, I used Plaintiffs' Exhibit 4, and also the Ohio State, the recent Ohio State report, which did list the dates of all the buildings and additions as sort of a cross-reference.

THE COURT: Before you do that, Doctor, I would like

to address another question, because I must confess I am truly confused with this line of testimony.

If there is something wrong with opening a school that is 90 percent black and something wrong with opening a school 90 percent white, then I assume the next step is that schools should be selected that are more equal. And so let's assume for a moment that these 13 schools were all located in sites where they are precisely 50 percent white and 50 percent black, or in view of the city's population, 30 percent black and 70 percent white.

Every one of these schools was open at that point. Within five years, by reason of situations over which the Board had no control, they all were then 100 percent white or 100 percent black.

Would you describe that then as a segregative intent by the Board?

THE WITNESS: Well, I think intent is hard to prove in some cases, but I think it might be described as a mistake in judgment.

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[R. I. 1437, Vol. 14] Q. Thank you. Would you go now to the building additions and the inquiry which you made?

A. According to my figures, if they are correct in terms of building additions, in terms of 1950 to the present, there were 62 separate school additions made in the Dayton System.

Q. Now, Doctor, just a preliminary thing. If there were two separate additions made to the same school, is that included in your 62 figure?

A. That's correct. Some of these are multiple listings, some more than two. Some may be three or four.

Q. So, if they made an addition in 1954 and another one in 1960 and another one in 1968, you would have three individual notations although there might be only one school listed?

A. That's correct.

Q. And that's how you get your 62 total?

A. That's correct.

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[R. I. 1438-1442, Vol. 14] Q. All right. Would you continue with your analysis?

A. All right. Out of the 62 additions made since 1950, 59 of these were made to schools which were 90 percent or more black or white. Out of the 59, there were 52 additions which were made to schools that were 99 percent either black or white at the time of the addition.

Q. All right. Did you break down any of those additions, in terms of their present situation as well?

A. Yes, I did. There were ten additions which were made to schools 95 percent or more black which remain so today.

Q. That's a different standard. That's 95?

A. That's correct.

There were 36 additions made to schools that were 90 percent or more white which remain 90 percent or more white today. There were ten additions made to schools 90 percent or more white which remain 80 to 90 percent white today. Remain there would be incorrectly used. I should say which are 80 to 90 percent white.

Q. I won't challenge you on that ground, Doctor.

Did you examine the closing of schools in the Dayton School System?

A. Yes, I did.

[R. I. 1439-1442, Vol. 14] Q. Did you make a separate analysis of that or was the analysis made in conjunction with other studies in particular areas?

A. Well, both but I do have a separate analysis of this criterion. The criterion works in a sense in both directions. You can keep schools open to maintain segregation, and sometimes when you close schools, what you do with the pupils who have been assigned to the schools being closed is an

important factor. In terms of keeping schools open to maintain segregation, I had access to the Touche-Ross and Company document made in 1972.

Q. Excuse me, Doctor.

A. I don't know whether that has been submitted as evidence or not.

Q. I believe it has. What is the Touche-Ross study?

I think it has been referred to several times. Can you tell me what it is?

A. I believe the title, at least, as I have it is the Business Operations Review Report.

THE COURT: Mr. Lucas, do you have an exhibit number on that?

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MR. LUCAS: It is Exhibit 56, Your Honor.

THE WITNESS: There is a feeling among many people, particularly school board members around the country, that schools are pretty inefficient and inefficiently run in their business operation, and it is quite a sound and reasonable technique these days to ask business people to come in and evaluate your operation and help you in terms of suggesting ways if money can be saved because finances in education are very important as always, and this is my understanding of the background of this study. The part I was particularly concerned about was the recommendation to the school system that they could phase out nine average schools and save something in the neighborhood of $700,000 to $900,000 annually by so doing. When I made the desegregation study in December of 1971, one of the recommendations in our report was also to close three elementary schools and one secondary school, and the reason we didn't recommend more was because we really didn't have time and that wasn't our major purpose. We didn't have time to analyze the buildings and so forth, but we were aware of a current situation where the projection for students in Dayton is one that is declining and the current situation of over capacity being available at both the elementary and secondary level on a city-wide basis, and in this situation where you have as in almost all instances considerable number of very old school buildings, I think it is intelligent to look at the operating expenses and so forth and see if any of them can be closed out. I also had access to Plaintiffs' Exhibit 61 which is a report that Mr. Weinman made in April of 1972 to the Superintendent in regard to our recommendation in the desegregation study of closing Hawthorne and Fort McKinley and Washington Elementary Schools. Out of reading these and also my contact with Dayton in December of 1971, it is my opinion Dayton could very definitely close some obsolete schools which were, for the most part, segregated schools and reassign the students so as to promote desegregation. There was one instance which I feel is a good example. There may be others of the Dayton System closing schools and then reassigning students in such a way that promoted segregation rather than desegregation when they very definitely had options that could have done the other. This was in 1962 in the case of closing Garfield and Willard Elementary Schools. It is my understanding that the students from Garfield and Willard were reassigned most of them to MacFarlane which opened in the same year and which, I believe, was the old Dunbar High School which was at that time 100 percent black which at least in 1963, the following year, had 100 percent black faculty. Students were also assigned to Irving which was 96.6 black, and in 1963 had a 50 percent black faculty, and to Miami Chapel which was 99.6 percent black and in 1963 had a 93 percent black faculty.

Now, if you look at the map very briefly in terms of distances, if you look at MacFarlane and Irving and Miami Chapel which are in sort of the south central area of the city, it is possible that these children could have been assigned to Patterson or to Hawthorne. That's Patterson Elementary, of course, or to Longfellow which are about the same distances from the schools being closed and which in 1963, the year after, were white schools. Patterson was all white and Hawthorne was all white and Longfellow was 6 percent black or predominantly white.

All I am saying in this example is that here we have closing of schools in which students are reassigned and in their reassignments sent to situations in receiving schools where segregation is either increased or maintained when they could be sent to equal distance schools in which desegregation would be effected.

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[R. I. 1443-1447, Vol. 14] Q. And what exhibits did you refer to in that connection?

A. I believe PX-108 which is a letter from Walt Spurgen — I beg your pardon. I believe that is a memo to Walt Spurgen from Mr. Ruhly dated September 18, 1972 in which essentially Mr. Ruhly gives the present location of portables in Dayton and a sort of history of the use of portables in the system.

Q. All right. In general before you get into specifics, how in systems which have been identified as segregated, what are the variations in practices which have been used in terms of portables or placement of portables?

A. Well, as in all of the other criteria that we are discussing, you can use portables as much as you can use school additions which is what they are, but they are temporary ones to either improve increased desegregation or maintain or increase segregation, and in many cases school systems have used portable buildings again much in the same way they do additions to increase or maintain segregation.

Q. Dr. Foster, let me give you a hypothetical example. Assume that a particular black school is becomming more and more overcrowded and there is available space in predominantly white schools and the School Board locates the portable units at the black school site. Is that hypothetical situation the type of situation you have described happening in other school systems?

A. Yes, it is, and the difficulty is that the protables tend to be frozen quite often in the location and then tend to maintain the segregated status.

Q. Can it also work the other way where you have capacity in black schools and overcrowded white schools with the portables being locates adjacent to the white schools rather than reassigning students to the other school districts?

A. Yes, and it very often works that way and I think in terms of Dayton this is done a good deal less than in many cities I have worked with.

Q. Can you tell me what your examination of PX-108 indicates?

A. In terms of present location of portables in 1972-'73, according to this memo, there are eleven portables used in the city. Three units are located at Cornell Heights Middle School which currently is 80.5 percent black. Four units are located at Orville Wright Middle School which is 8.1 percent black. One unit is located at MacFarlane Middle School which is 99.6 percent black, and three units are located at Washington Elementary School which is 15.3 percent black.

Q. That's the present locations?

A. That's right. These figures range from in terms of desegregation or segregation from 8.1 to 99.6, but in comparison to the city as a whole, the school system as a whole which I believe is around 45 percent black this year, it would appear that all of these locations are racially identifiable schools.

THE COURT: Dr. Foster, do I understand that any use of portables is suspect?

THE WITNESS: Oh, no. I didn't mean to infer that. I think it is like the other criteria. It is simply a question of how you do it.

THE COURT: If you do it in a school that is predominantly white, it can be asserted it is being done to retain the students there. If it is done in a school that is predominantly black, the same argument can be made.

THE WITNESS: Right.

THE COURT: Then, in all these criteria the School Board is faced with the option of transporting; is that right?

THE WITNESS: Well, not in all.

THE COURT: Well, in lieu of this.

THE WITNESS: Sometimes you have alternative walking situations, but I would guess in most of them you would have the alternative, yes, of either portables or transportation.

THE COURT: Well, in the case of additions, you could assert that it is additions or transportation.

THE WITNESS: Again not always but quite frequently, yes.

THE COURT: How do you regard, then, the basic situation of the school system that has portables and has built additions?

THE WITNESS: You mean in terms of the wisdom of making this kind of decision?

THE COURT: No. Let me use the word I used before. Is that situation suspect?

THE WITNESS: Oh, very much so, yes, and I think in terms of building additions particularly so in Dayton.

Q. Let's go into the historical locations of these portables.

A. The data given in the memo indicated that in terms of putting in new portables starting in 1966 with two units at Franklin and continuing through 1971, some of these would be the same units, only eight moved. At the time of their installation, the 15 examples given or cases given in the memo to Mr. Spurgen, the percentage black at Franklin in 1966 was no black. One unit went into Jackson Primary in 1967, 99.7 percent black. One unit went to Jackson Elementary in 1967, 98.6 percent black. Two went to Cornell Heights in 1971 at 72.3 percent black. One at Cornell Heights in 1969 at 59.1 percent black. Three at Washington in 1969 which was then 16.6 percent black. Three at MacFarlane in 1969 which was then 99.9 percent black, and two at Weaver in 1969 which was 100 percent black.

So, in all of the locations mentioned which is a total of 15, these would be at the time of installation racially identifiable schools with the possible exception of Cornell Heights which was 59.1 percent black in 1969.

Q. Dr. Foster, would you at this point tell me if you made an inquiry into the question which I think related to the construction issues of site selection?

A. Yes.

[R. I. 1448-1449, Vol. 14] Q. And what was that inquiry?

A. In terms of the use of site selections to maintain segregation, in the new construction sites from 1950 which we have already discussed to the present, many of these have helped to promote and to impact and lock in segregated or isolated situations either in the inner city or in the suburbs, and I think this is true in terms of both school segregation and housing segregation, that is, in terms of its effects. First of all, in the area of the white suburban expansions which are farthest from the center of the city which is all black, and these were, of course, more inaccessible at the time of construction than they are now. We have Valerie which was built in 1966 which is almost at the extreme north of the district. We have Meadowdale High School built in 1960 and Meadowdale Elementary built in 1957 to the north of the district. We have Shoup Mill built in 1958 and to the nearly extreme north. The south and east of the furthest white suburban expansion, we have Eastmont, on the extreme east built in 1965. We have Wilbur Wright to the northeast built in 1952, Horace Mann to the southeast built in 1954, and Belmont High School in the southeast built in 1956.

Now, contrary-wise, in the inner city during this time there were a couple of examples of schools which were built into locked-in situations in terms of segregation, and in fact these schools were surrounded by other schools which were all black. That would be McNary in 1964 and Jackson Primary in 1960.

Q. Dr. Foster, in your experience, use of the primary unit in close proximity to elementary schools, has this been a matter reflective of segregation practices in your experience?

A. Yes. It is in a sense very much nothing more than an addition. They are on the same campus and for all practical purposes they are really one school.

Q. What effect does this have on the existing racial concentrations?

A. Well, it tends to secure it and to further insure that those schools are going to remain segregated and that the system as a whole is going to remain segregated.

Q. Do they tend to have the same boundaries as the existing elementary school?

A You are talking about the primary?

Q. Yes.

A Yes, they do.

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Q. And Dr. Foster, you identified some examples of schools located further east away from black population centers?

A. That's correct.

Q. And you have also given us some examples of schools at the furthest extreme from white population areas, or in the middle of the central city core?

A. That's correct.

Q. What effect does a pattern of construction of that nature, these two extremes, have in terms of patterns of metropolitan development, in terms of both school and residential segregation?

A. Well, I think it encourages residential segregation in terms of making schools that people know are going to be white, unless some sort of desegregation plan is instigated, and they have some sort of security in buying into a school like that if they can afford to.

And also, in the inner city, they designate those school as locked-in black schools, which if they are going to be used are going to stay segregated. I think the Court's language for this, which even lay people can understand, was something like, as I remember, a loaded game board, and it sort of sets up that kind of situation when you attempt then to desegregate.

Q. I assure you, Dr. Foster, that laymen are not the only ones who have trouble understanding court language.

MR. GREER: Move to strike counsel's comment.

THE COURT: Come on, let's go.

That is not totally incorrect, though.

Let's go.

BY MR: LUCAS:

Q. Dr. Foster, you mentioned one of the things you looked for in terms of pattern or segregation. Did you note some instances of that from your view of the records in the Dayton School System?

A. I'm sorry?

Q. Use of transportation as technique of segregation. Did you note some instances of that?

A. Yes, I did. Some very minor ones, and I think these have been talked about before in the testimony. The question of the VA students being transported from what would not be the Carlson attendance area, the problem with the Edison fire, which I believe was in 1968, and that was corrected shortly thereafter the following year.

MR. GREER: Can I make specific my continuing objection when we are simply reviewing evidence that is already before the Court?

THE COURT: Gentlemen, may I advise both counsel that the Court has been instructed exhaustively, and I do use that term, as to the Shawan Acres situation, as to the Veterans Hospital, and as to the fire at Kiser School.

May I ask that we refrain, both sides, from future witnesses as to these subjects, and pass on to something which the Court has not heard testimony on.

MR. LUCAS: All I am asking the witness is if he found some instances of that. I didn't intend to go on.

THE COURT: Well, I'm afraid unless we are stopped, it's going to happen, Mr. Lucas.

Let's go on to something further.

BY MR. LUCAS:

Q. All right. You did mention the VA Hospital. Is that one of the optional areas that you studied, Dr. Foster?

A. Yes.

Q. All right. And what optional area is that? Perhaps we can refer to that out of order.

This might be an appropriate time.

A. That would be the Residence Park-Jackson optional area, which would be more in evidence on the elementary, 57.

Q. Do you want to step to the map, Dr. Foster. Would you indicate it on the small map? Stand back so the Court can see the map.

A. This would be the hatchmark over the green area, which would lead into Jackson on the east and to Residence Park on the north.

[R. I. 1453-1455, Vol. 14] Q. All right. How did you understand that the option worked between Residence Park and the Carlson area?

A. My understanding was that the students, and I don't know the exact date of the inception of this optional zone, but it is given on the data that was used to make this overlay.

The students have the alternative of going either into Jacksonn or into Residence Park.

We have studies exhibits for the Defendants, DXCP, which I believe gave the attendance at Jackson from 1957 to 1972 for the VA children, and that figure was zero. Defendants' Exhibit DX –

Q. Excuse me, Dr. Foster. What was the racial composition of Jackson?

A. Jackson in 1951 was 35.9 percent black.

Q. And in 1957?

A. In 1957 I don't have the figure. In 1963 Jackson was 98.5 percent black.

I believe Mr. Rivers testified, and I believe that he was at Jackson, that Jackson did have a few white students, and at Residence Park in 1957 it was basically white.

I'm not sure whether those are his exact words, but that's the substance of it.

Q. Jackson was a black school and Residence Park was a white school, and Defendants' Exhibit CP indicates no child

from that optional area of the Veterans Administration Center in attendance at Jackson, is that correct?

A. That's correct.

Q. What about the attendance of children at the white Residence Park Elementary School? Did you examine Defendants' Exhibit CO?

A. I did, yes, and those figures were for the same years at Residence Park, and the attendance of VA children given in that resume from 1957 to 1972 was a total of 48 children, 8 of whom were black, five the race of whom were unknown, and 35 were white.

Most of these actually were in the late 1950's.

Q. What was the effect of that optional zone at that time, the Veterans Administration Hospital?

A. Well, it allowed the white students in that optional zone to attend white schools. I believe that was Residence Park.

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[R. I. 1455, Vol. 14] Q. Dr. Foster, I believe in earlier testimony you referred to the manipulation of zone lines.

Did you make any study of this type of practice in the Dayton School System?

A. Yes, I did.

Q. Perhaps since I believe in going into that we would get into optional attendance zones, would you first of all, and I'm backtracking, tell me what exhibits you used and what maps you examined and indicate some of the optional areas which you identified between schools of opposite race?

A. In the optional zone criterion, I examined the various overlays and base census maps. I believe in terms of exhibits the one that is currently on is the elementary '57 overlay, which would be PX-47A, and the ones following that in terms of dates at both the elementary and high school and middle school level, and the different base maps, starting with the PX-46A, I believe, having to do with the ten-year census data.

I also examined other exhibits having to do with Board decisions in creating optional zones.

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[R. I. 1457-1458, Vol. 14] Q. You do have that data as to those other five, is that correct?

A. Yes.

Q. All right. Would you list them, giving us the name of the school and the racial composition?

A. All right. The first group that I established was created in 1953 by the Board.

One was Willard and Irving. This was in the Board minutes, Plaintiffs' Exhibit 123. Willard at that time was 100 percent black. Irving in 1951 was 46.6 percent black.

The second one was Jackson and Westwood established in 1953. Westwood was 0 percent black and Jackson, in 1951, was 35.9 percent black.

The third one was Whittier and Willard. Willard was a hundred percent black and Whittier, in 1951, was 29.9 percent black.

A fourth option was Whittier and Miami Chapel. Miami Chapel was 100 percent black in 1951. Whittier was 29.9 percent.

A fifth one was Wogaman and Highview. Wogaman was one of the all-black schools, and Highview, which was opened in 1951, I believe –

Q. Excuse me. Going back to Miami Chapel: Can you check that year with the year that it was opened?

A. Well, the '51 may apply to Whittier and not to Miami Chapel. It may have been opened a year or so later. I think it may have been opened in '53.

That's correct. Miami Chapel was opened in 1953 at 100 percent black.

Highview was opened in 1951 at 1.7 percent black.

The sixth in this group –

Q. Highview was with Wogaman, is that correct?

A. That's correct.

Q. And Wogaman was 100 percent black?

A. That's correct.

Q. All right. The sixth in the group was Edison and Jefferson optional zone, which was not listed in the Board minutes

in PX-123, but it does appear on the elementary '57 map.

In 1951 Edison was 43 percent black and Jefferson was 0 percent black.

Q. Excuse me, Dr. Foster. Are you dividing these by years?

A. Well, sort of by the groups as I described them earlier. The three high schools, the six elementary schools that were developed in '53, and then the balance.

Q. All right. Fine.

A. The three high schools were Roosevelt and Colonel White.

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[R. I. 1459-1461, Vol. 14] Well, this is sort of a complicated one. Around 1951 part of the present optional zone between Colonel White and Roosevelt was established, and I think in 1957 the balance of the present optional zone was established.

Q. In 1951 what portion of the optional zone as it appears on the present map was created?

A. This would be the part closest to the Wolf River, the southern part.

No. That would be the northern part. I beg your pardon.

Q. It's Wolf Creek, I believe.

A. Wolf Creek.

Q. Wolf River, I believe, is in Memphis, is that right?

A. That's correct.

Q. Thank you.

A. I misspoke. This would be the northern part, since the optional zone was carved out of the original Roosevelt zone, so the first one, part of the option that was established in '51 was the northern section.

Q. And at that time Colonel White was what kind of school?

A. I understand it was ninth and tenth grades, and the juniors and seniors went to Fairview.

Q. Is that referred to in the Board minutes as Fairview-White option as well? Have you seen such reference?

A. I can't say for sure, but I believe so. It was Fairview-Colonel White in the early part.

Q. So as I understand it, a student in the ninth and tenth grades in the northern part of this optional attendance zone could, instead of going to the zone which this was carved out of, Roosevelt, go to Colonel White for the first two years, and thereafter all the way north to Fairview High School, is that correct?

A. That's my understanding, yes.

Q. For his last two years.

All right. Can you go on with the Roosevelt-Colonel White analysis in terms of what the racial composition was at particular times?

A. Well, in 1951 Roosevelt was 31.5 percent black, and the Colonel White-Fairview combination was 0 percent black.

Following the additional segment of the optional zone, and I believe it was 57 or close to it, Roosevelt in 1963, which was the next year that we have data, was 94.5 percent black, and Colonel White, which had then been established as a four-year high school, was 1.1 percent black.

Q. Did you say black or white? I'm sorry.

A. 1.1 percent black. I'm not sure which I said, but that's what I meant.

[R. I. 1461, Vol. 14] Q. In examining the other data and the depositions which you have listed, did you determine any of the other operative facts with respect to the way in which this optional attendance area worked?

A. Yes. We do have hard data in Plaintiffs' Exhibit 15-A, I believe it is, giving the number of optional area students attending Colonel White by years. In 1959 there were two blacks and 186 whites. In 1960, two blacks, 284 whites. In 1961, two blacks and 304 whites. In 1963, six blacks and 360 whites.

And our next date shows quite a change in the direction. In 1968 there were 216 blacks out of the option attending Colonel White, 191 whites. 1969, 245 blacks, 109 whites. In 1970, 298 blacks and 75 whites.

Q. What had happened to the total racial composition of Roosevelt at this time?

A. Roosevelt had become an all-black school and Colonel White partially so.

Do you want those figures?

Q. Do you have the figures for Colonel White, 1968-'69?

A. Not on this sheet, but I have it.

1968-'69, Colonel White was 19.3 percent black.

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[R. I. 1466-1471, Vol. 14] Q. I believe referring to the exhibit, Doctor Foster, in 1951 there were black students in Roosevelt at that time; is that correct?

A. 31.5 percent black I believe I read a few minutes ago.

Q. All right. What other optional attendance areas have you examined at the high school level?

A. At the high school level, Roth and Fairview which according to my notes and, I believe, in the Board minutes which would be PX-123, if I am not mistaken, Roth and Fairview which is pictured by the red hatchmarks on the west central part of the large map, it is a rather small zone and my understanding is in terms of racial composition in 1967 which was two years after the beginning of the option, Fairview was 8.1 percent black. Roth was 85.7 percent black. Currently in 1972, Fairview is 24.1 percent black. Roth is 5.8 percent black.

Q. Is it your understanding, Doctor, that this involved very few students?

A. It is my understanding it still involves some but the number is very small, something under five students there.

Q. All right. Have you examined the Colonel White-Kiser option?

A. Yes, I did. This was established in 1962 and is still operative and is illustrated on the map by the red hatchmarks between the two zones and just to the south of the McGuffey zone on the large map. In 1967 — well, let me say that I do have data about the number of children in this optional zone attending Colonel White and Kiser by race beginning in 1962 and going through to 1971.

Q. What is the source of that information, Doctor?

A. This is Plaintiffs' Exhibit 15B and 15B-1, I believe.

Q. All right.

A. The total figures for '62 through '65 were according to my notes 58 white pupils opted to go to Colonel White and 26 whites to Kiser, and I also threw Patterson into that since it is a city-wide school and is part of the racial picture.

THE COURT: Excuse me. Doesn't the choice exist irrespective of this area, this optional area?

MR. LUCAS: Yes, Your Honor, but 15.1 does indicate some of the students from that area went to Patterson in some subsequent years.

THE COURT: I am curious, though, about the relevance of that. Might that not distort this situation? In other words, the option to go to Patterson is city-wide, as I understand it. It has nothing to do with residents in this optional area or am I incorrect, Mr. Lucas?

MR. LUCAS: Your Honor, I would agree with the Court that it is not limited to this optional area but it may, in fact, have something to do with the option.

THE COURT: I am afraid a figure as to Patterson which is a fragmentary figure — well, I will receive it, of course. I would prefer if this would testify specifically as he has as to the number of students who have exercised their option irrespective of Patterson. I would prefer that that not be included in the total. If you will keep it separate, Doctor —

MR. LUCAS: I don't think we are going to total them. I think we will keep them separate and just indicate the movement from that particular area to other schools in a section.

THE COURT: All right.

THE WITNESS: The exhibit gives between 1967 and 1971 opting to Colonel White were 27 whites. Opting to Kiser were 102 whites.

THE COURT: Excuse me, Doctor. May I have those again?

THE WITNESS: 27 white students to Colonel White and 102 white students to Kiser.

THE COURT: I must ask you once more. My pens here are not working near as well as they ought to. What was the figure?

THE WITNESS: 27 white students to Colonel White.

THE COURT: Thank you.

THE WITNESS: And 102 white students to Kiser and 15 whites to Patterson. Then, in the year '71-72, no white students to Colonel White, 20 white students to Kiser and four whites to Patterson.

BY MR. LUCAS:

Q. Dr. Foster, you say opted to one school or the other. Is it your understanding that the particular optional area was carved from one of the particular school districts and, if so, which one?

A. I believe it was carved from Colonel White.

Q. During the same period of time, do you have the racial composition of Colonel White and Kiser from 1968 and 1972?

A. In 1968 Colonel White was 8.4 percent black according to my figures and Kiser was 9/10 percent black. In 1972, Colonel White had changed to 54.6 percent black. Kiser was at 9.8 percent black.

Q. All right. Were there other elementary school zones which were optional in nature that you can identify?

A. Yes. The one between Residence Park and Jackson which we have discussed earlier, and then there were five others. In 1954, an optional zone was established between Residence Park and Addams. Shortly before that in 1951,

the data indicates that Residence Park was zero percent black and Addams was 29.3 percent. That's Jane Addams.

Q. Do you have the figures for 1963, Dr. Foster?

A. Between Residence Park and Addams.

Q. Yes.

A. Addams in 1963 was 41.6 percent black and Residence Park which would be elementary was 80 percent black.

Q. All right.

A. The second one established in 1957 was Westwood and Gardendale. Gardendale was 7.9 percent black and Westwood was 94.7 percent black, and the option was still in existence in 1963. In 1960, another option was established between Addams and Residence Park which in a sense was the reverse from the previous option. Again, the figures for 1963 indicate that Adams was 41.6 percent black and Residence Park was 80 percent black so that the racial situation had reversed. At that time, another option established in 1962 was – I beg your pardon – in 1965 was Emerson and Irving. Emerson was 0 percent black. Irving was 100 percent black, and the final option I have listed is Belle Haven and Ft. McKinley which was established in 1972. Belle Haven had 17.7 per black and Ft. McKinley 2.6 percent black.

Q. Dr. Foster, examining these optional attendance areas – as a preliminary matter, let me ask you as an administrator whether or not the use of optional attendance areas is in your opinion sound?

[R. I. 1472-1473, Vol. 14] A. You mean from a general school administration standpoint?

Q. That is correct.

A. In my opinion, it is an important administrative device.

Q. Why is that?

A. Whether it is racially connected or not racially connected. Well, essentially I suppose like anything else in administration, what you are establishing is a rule, and then you start making exceptions to that rule and you make one exception for one group and another group wants an exception, and before long you are in an administrative nightmare.

If I can cite one example quickly of this in Dade County which is the sixth largest system in the country, when we worked with them on their HEW compliance about three years ago, the present superintendent asked us to recommend immediately that all optional zones be erased and they had something like well over 150 of them which I believe the previous superintendent had established. I cite this as an example that there were some racial zones, but essentially it was this administrative's feeling that it would just be gotten rid of and it would be a much better situation for the School Administration generally.

Q. In what way do optional attendance areas affect desegregation and the stability of pupil assignment to particular schools?

A. Well, essentially in my opinion they create instability in the public in one way in terms of housing choices where there are choices and in terms of perception of whether a school is going black or staying white, this sort of thing, so that generally where you have an optional zone which has racial implications, you have an unstable situation that everybody realizes is in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation.

Q. The optional attendance zones which you have identified in your testimony today, what is your opinion with respect to the effect or if there is any effect on racial composition of schools in Dayton?

A. Well, in my opinion, these accelerated and precipitated further segregation, and in those cases where I was able to cite hard figures, I think that is very definitely borne out, and I have no reason to believe that in all the other cases the same thing was true although I can't cite actual pupil figures from year to year because they simply aren't available.

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[R. I. 1479, Vol. 15] Q. Dr. Foster, with reference, first of all, to the option attendance zones, you described certain effects.

Are there short term as well as long term effects of the utilization of optional attendance zones?

A. Yes. In the ones we talked about at the high school level, if we can cite the Roosevelt-Colonel White optional zone, and the following Colonel White-Kiser optional zone, the short term effect it seems to me is to allow whites to move out of a school assignment that is becoming black, and I should point out that this is not to say that in many cases that at a certain point blacks also take advantage of this option.

In the Colonel White-Kiser situation, for example, as Colonel White has become blacker, we are at the point where there are no whites apparently opting now to go to Colonel White.

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[R. I. 1481-1483, Vol. 15] Q. Turning now, Dr. Foster, to the criterion manipulation of zone lines which you described, will you first of all tell me how you go about examining and what you would include within the definition of changing or manipulating zone lines? For example, would you include, say, new construction, for instance, as a zone line?

A. We would because generally unless there is a clear substitution of an existing school by a new school, new construction, for example, on the same site or virtually on the same site, you do have changing boundaries in the attendance zone when you set up new construction so that is very definitely a new factor. Essentially, the way you examine this is to take whatever data is available in terms of maps or descriptions of zone boundary lines and simply decide over a period of time how they have changed if at all and to what purpose they have been changed.

I did find, I think, in my examination of this in Dayton that attendance zone lines have remained relatively stable over the past 20 years and especially in comparison to many other systems that I have observed.

Q. All right. In light of the stability of the pattern – well, perhaps before we get to that because I will want to come back to that later – did you examine in particular the West Dayton area in light of this concept?

A. I did.

Q. And in examining the area and in terms of understanding what happened there, did you have to deal with some of the other criteria you have already discussed such as optional attendance and so forth?

A. Very definitely all the criteria because in almost every instance, the criteria worked together rather than working in isolation.

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THE COURT: Before you do, let me ask a question: Anytime a school system builds a new school, this by definition requires a change of attendance lines, does it not?

THE WITNESS: Not always. If you have, as I tried to explain and didn't do a very good job, if you have a building, a new building replacing an old building, sometimes they will maintain the old building while they are completing the new construction, and as soon as they get the new one finished, then the kids simply move over into the new construction. The old building is either razed or used for other purposes.

THE COURT: Absent that, Doctor, assuming a situation where you build a new school that is not a replacement, as population shifts geographically you build a new school. That must include a change of a boundary line.

THE WITNESS: Correct.

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[R. I. 1485-1505, Vol. 15] Up on the small board is the census map of 1950, Plaintiffs' Exhibit 26B, and the elementary overlay of 1957, which is 47A, is that correct?

A. Yes, sir.

Q. All right, sir. Can you tell us what your analysis was in the Dayton area of the changes in boundaries?

A. Plaintiffs' Exhibit 75 points out that at this time, I believe in the winter of 1962, in December — no, 1952, in December, the Board went about making some decisions about redistricting and building and so forth in the west side schools. Some of these decisions had obviously already been made.

There were apparently two alternatives which were termed Plan A and Plan B, and the Board opted to go at this time with Plan B.

In describing this situation, I would like to not only talk about zone lines and changing zone lines, but also school additions and the other factors I have been discussing in concert with the zone line situation, and I think I can be very brief about doing this, but doing it in such a way that the interrelationship and the connection will be made, because it is very difficult to consider any one of these factors in isolation from the other factors.

It is very much more of a gestalt type of arrangement.

So in Plan B, the decision was made to decrease the Wogaman attendance areas.

Q. You are talking about the 1953 and this 1957 map is a result of Plan B, is that right?

A. Yes. This map shows Wogaman at this stage, and it was much larger, of course, in 1953, or '52, prior to the change.

Wogaman was decreased, and the Jackson zone, which is immediately to the north of Wogaman, was added to, and the Weaver zone, which is to the north and east of Wogaman was added to.

At the same time Willard, which was one of the schools in consideration, and I might say that Willard and Garfield and Wogaman at that time were all black schools, but Willard was kept the same; Garfield, which is just to the north of Willard in a fairly compact residential area, obviously because of its small size, was decreased and additions were made to Edison to the direct north of Garfield, and to Irving, which is to the southeast and can be seen on this map with quite a bit of green in this area.

Now, in discussing this move, the racial proposition of the schools which were added to according to the 1951 data, which was just two years prior to the move actually, Jackson, which took this part of Wogaman, was at 35.9 percent black in 1951, Edison was 43 percent black. For the schools that took part of Garfield — I beg your pardon.

I need to go back to where I ended with Jackson which took in part of Wogaman.

Weaver took in the other part of Wogaman. Weaver was at 67.6 percent black in 1951.

Q. Let me stop you at that point.

Wogaman was all black, so that any area taken in would have been black, is that correct?

A. That's correct.

Q. And the Jackson percentage was at that time what?

A. 35.9 percent black.

Q. And Weaver was sixty —

A. — 7.6.

Q. All right. So that was the 51 enrollment, is that correct?

A. That's correct.

Q. So they added from the black enrollment at Wogaman initially black students?

A. Yes. And the result obviously would be to increase the black percentages in those two schools, since the territory being transferred was all presumably black pupils.

The two schools that took from Garfield were Edison, which in 1951 was 43 percent black, and Irving was 46.6 percent black.

Garfield, of course, was also an all-black school.

Q. Would this have any effect, Doctor, of adding blacks to those other schools?

A. Presumably, since all the territory taken in was black residential area.

Q. All right. Doctor, in terms of the system as a whole, how did these schools to which black students were added compare with other schools in the system in terms of their black-white enrollment?

A. In looking at the 1951 data which we have, outside of the all-black schools we are concerned with, Wogaman, Willard and Garfield, the four schools of Jackson, Edison — Edison here, Weaver and Irving were the four highest percentage elementary black schools in the system.

Now, at the same time it is important to note that in 1953 we did discuss this in our openings, that Miami Chapel, which had been formed out of the Wogaman district or zone, opened as a 100 percent black school with pupils in 1953, which would be the same time these changes were made.

In terms of teaching staff which is one of the criteria involved in this analysis, according to the data in PX-3, Plaintiffs' Exhibit, by 1957 three or more black teachers had been assigned to Edison, to Jackson, to Weaver, to Miami Chapel, to Highview, to Whittier, and to Irving, and, of course, the three all-black schools of Garfield, Wogaman, Willard had all-black staffs.

Q. Miami Chapel, did it have more than three black teachers?

A. I believe Miami Chapel opened up in 1953 with somethink like, if my memory serves me, 85 percent black teachers.

I don't know how many were on the faculty. So that in terms of teaching faculty, in terms of race, it is clear that the faculty assignment indicated that the schools involved in this total configuration were either all-black schools or going to be black, predominantly black schools.

Q. Now, Dr. Foster, were there any black teachers assigned to the other schools in the system at that time?

A. I believe that those are the only schools, the ones I read, which had as many as three black teachers at that time, which was 1957. I'm not even sure whether the data indicated whether there were any less than three teachers. But at that time that was a rather significant number of black teachers to to be assigned to any school.

Now, if you look at another criterion which we have been discussing, that of building additions, and in looking at this total area, the west side area, we note that in 1954 and 1958

there were additions made to Irving which had received part of the Garfield territory.

In 1954 and '58 there were additions made to Edison which received the other part of the Garfield territory, and in 1954 and 1955 there were additions made to Weaver, which received part of the Wogaman territory. Another factor that is involved in this total gestalt would be optional zones.

In discussing optional zones, we will remember that I mentioned six elementary schools which the Board in 1953 had created optional zones.

All of those are in this complex. According to Plaintiffs' Exhibit 123, which is Board minutes, an optional zone was created between Whittier and Miami Chapel directly to the west of Whittier designated by the cross-hatch, and apparently from the map a territory, the zone was taken out of the Miami Chapel area which was formerly, of course, Wogaman.

Q. Now, the area within the zone, does it coincide with the color coding on the map?

A. The area in the optional zone between Miami Chapel and Whittier corresponds completely — it is in the shape of a triangle in the southeast corner of Miami Chapel. It corresponds with the green census data which is 5 to 25 percent black in 1950.

Q. Does the western boundary, the optional area, take out all of that green area from the Miami Chapel zone?

A. It does coincide as I see the map, with the line separating the green part of Miami Chapel zone and the red part to the northwest.

Q. Miami Chapel is 100 percent black. What was Whittier at that time?

A. Well, not at that time but in 1951 Whittier was 29.9 percent black.

Q. And what color appears in the Whittier zone?

A. Whittier has a little orange to the northwest. It has quite a bit of green to the west and to the north and about two-thirds of it is white, but this might be a bit deceptive

because it appears from the map that quite a bit of that is not populated.

Q. What was the effect of the optional zone at that time for Miami Chapel and Whittier?

A. The effect would be to allow the blacks – pardon me – the whites in the southeast corner of Miami Chapel to attend Whittier which was essentially a white school at that time.

The second optional zone created – I beg your pardon.

Q. I think you have answered the question. Go on to the next option.

A. It was between Willard which is here on the map and Whittier which we have just been discussing, Whittier to the southeast of Willard. Willard in 1951, as we know, was 100 percent black, and as we have just said, Whittier was 29.9 percent black, and again this optional zone allowed the whites in Willard to attend Whittier.

Q. And the color in the Willard area at that point was what, orange?

A. Almost completely orange on the census in 1950 which indicates 50 to 85 percent black.

Q. There is another optional area apparently just above that. Can you describe that?

A. The optional area just north and a little east of that is between Willard and Irving. We said Willard was a 100 percent black school in 1951. Irving was 46.6 percent black. This allowed the white students in the northeast section where the zone is at Willard to attend Irving School.

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Q. Dr. Foster, just to clear this up for Mr. Greer, I believe you started your testimony indicating there had been a change in policy simultaneous with the adoption of many of these optional areas; is that correct?

A. I don't know whether I did, but there was a change, I believe, in the year 1952 by the Board which said there would be no more transfers.

Q. Now, your testimony goes that the orange area indicates

the presence from the census of some whites in that area, does it not?

A. That's my assumption, yes. I think the part that is confusing is that the data for school population while it may give 100 percent black doesn't mean as we know in many cases that the children living in the area are all black because under the previous transfer rules, those children may have transferred out.

Another optional zone created in 1953 was the Jackson-Westwood zone which is to the north of Jackson and to the south of Westwood.

In 1951, Jackson was 35.9 percent black. Westwood was all white.

Q. Now, you said that Jackson had black students from Wogaman added to it as a result of the action in 1953; is that correct?

A. That's correct.

Q. And this option was created, I believe you said, by the Board in the winter of 1952?

A. I believe in December, yes.

Q. Do you know whether or not it was implemented in December or the following September? Do you know that?

A. I am not absolutely certain, but I am reasonably certain it was begun in September of the following year.

Q. All right. What was the effect in terms of boundary changes, if any, of the creation of that option between Jackson and Westwood?

A. Well, essentially it had the effect of shrinking the northern boundary of the Jackson elementary zone because the students according to the census map residing in the optional zone would probably have been white students since the area is designated by white which according to the map is zero to five percent black in the census.

Q. Dr. Foster, as I understand the optional attendance area as it works, the southern boundary of the optional attendance area is now the mandatory boundary of Jackson

and people below there are automatically assigned to Jackson; is that right?

A. Yes, because all of the optional zone would be part of the Jackson attendance area.

Q. North of that they could go either to Jackson or Westwood; is that correct?

A. Since that is part of the zone, I assume so, yes.

Another optional zone that was created in 1953 was Wogaman, between Wogaman and Highview, and it is not clear on this map and I am not certain, but I assume it might be a one-street zone since I believe the maps do not indicate one-street optional zones. In any event, the zone is to the south of Wogaman and to the north of Highview. It would be indicated by the fact that there is a very minute –

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THE WITNESS: – very minute space between the two colors of blue, blue on the side and red on the north.

BY MR. LUCAS:

Q. When was Highview opened?

A. Highview was opened, I believe, in 1951 as a 1.7 percent black school.

Q. Now, the boundary, the northern boundary of Highview and the southern boundary of Wogaman, are they related with the exception of the one street optional area you have indicated to any color coding on the map?

A. Yes. The boundary goes along on the western part where, in fact, the housing is. It goes along and divides on the north. The all-black section of Wogaman is marked in red which is 85 to 100 percent black on the census map, and to the south of the line is the blue of Highview which is 25 to 50 percent black according to the census data.

There is one final optional zone created at that time which brings the total to six. I don't believe this was included in PX-123, the exhibit of the Board's minutes, but it is on this map of elementary 1957, and I would assume that it was created either in 1953 or shortly thereafter, and that is the

optional zone between Edison and to the north and northwest Jefferson Elementary Schools. This would be the optional zone which is covering completely the green color on the base census map, green being 20 to 25 percent black.

In 1951, we know Edison was 100 percent – I beg your pardon – we know Edison was 43 percent black and Jefferson was all white. The results of this as in the other cases would permit these white students in the optional zone to option for Jefferson rather than to go to the blacker school at Edison. This would as in the situation to the west of Jackson and Westwood have the effect of shrinking the northern boundary of Edison in this case.

Q. Dr. Foster, did you locate any particular alternatives that could have been done with respect to the Wogaman School?

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A. I did note a couple of alternatives. As examples, to the south we did have Highview at that time which as we noted was opened in 1951 at 1.7 percent black. And, of course, the point I am making there is the territory from Wogaman could have been added to Highview since it was in certainly a walking distance and very little difference between the two schools. Another possibility might have been to use Grace A. Greene as a receiving school from Garfield. Grace Greene is actually – maybe a little closer to the Garfield building. It is about the same distance as Edison, and they are all within walking distance of each of the three schools. Grace Greene in 1951, I believe, was 6.5 percent black. This is merely illustrative of the fact that by making another choice the Board could have moved the black students to a much wider option at the time than they chose to do.

Q. Dr. Foster, just looking at the area as you have done in terms of the construction additions and new school construction of Miami Chapel and redrawing of attendance boundaries and creation of optional zones, what was the effect of the implementation of Plan B in West Dayton?

A. Well, I think the effect was clearly one of locking in and freezing this configuration including these schools into an all-black school situation.

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A. I did list three cases where schools were opened involving changing zones and one we have discussed in 1951, the Highview School, was opened just to the south of Wogaman with Wogaman 100 percent black and Highview opening at 1.7 percent black, and I believe that previously I stated that this zone line might have been changed to move more black students into Highview.

THE COURT: Excuse me.

Dr. Foster, I am concerned about the horns of the dilemma that a school board now finds itself on, because a previous witness testified that when you start moving black students into a white school, you merely accelerate the turning of that school into white.

Now, you have just suggested that an alternative would have been to move them into the Highview School. No matter what the school board would have done, is it not true that it would have had the effect of accelerating the movement of blacks into a school?

THE WITNESS: Well, let me say that I agree with some of what you are saying. The problem, as I see it in this type of situation, is essentially one of diddling around piecemeal with desegregation instead of attacking the problem wholesale and making clear that you are desegregating the entire system.

THE COURT: Would that involve transportation then?

THE WITNESS: In a situation today it certainly would, yes.

THE COURT: Is it fair to say, Dr. Foster, that from your analysis and your testimony that the only viable alternative to this would be a system of transportation of children, that anything else is mere a makeshift? I don't want to put the words in your mouth.

THE WITNESS: Right.

THE COURT: But I'm getting the feeling that there is only really one alternative in your opinion.

THE WITNESS: No. I think there is a second alternative. I guess that is redundant. There is an alternative. Rather than do it the way in which the Dayton Board did in addressing itself to this very real problem in west side, of a changing community, which certainly has housing overtones and all the rest, if the Board does take a stance as I suggested they could have in a couple of situations in this change, where there were white schools directly adjacent, the message clearly is to the community that the Board is doing everything it can, even though over the long run the results may wind up segregated, but at least it is doing everything in its power to maintain a desegregated situation.

I think the result of this is to produce more stability in real estate movements, in the general public's attitudes of, well, the whole area is going black, so you know, that's the way it is.

THE COURT: Doctor, there has been testimony here of a tipping point that has been used.

Do I understand that what you are now suggesting is that as long as the Board doesn't exceed the tipping point, it would be satisfactory to adjust zone lines as an alternative to transportation?

THE WITNESS: Well, I'm not sure what your question is.

THE COURT: All right. It's possible that I'm using a term that I assumed was a general one in this field.

THE WITNESS: Well, it is. I don't agree with the concept because as far as I know there is only one piece of research that I have seen on this. There may be others. But Johns Hopkins did a research of tipping point some years ago in relation to desegregation on the assumption that there was a point at which there was a big movement of blacks, and the results of the research indicated this wasn't so; that if a certain area of

a city is going to go black, then it simply goes black over a period of time.

THE COURT: Irrespective of the school board does?

THE WITNESS: No. It is simply a question of the school board contributing to the pattern and accelerating it and exacerbating the whole movement.

THE COURT: Well, any change such as you are now discussing that would have the effect of making a white school of a larger percentage of blacks becomes then a matter of degree, because witnesses have testified that there is a community perception and that after a student body passes a certain point it is perceived as a black school.

Now, if that is true, then the school board is faced with the problems of so adjusting the percentages as not to send black students to a white school, so as to make that perceived as a black school.

THE WITNESS: Well, to start with, I do think this is a controversial issue, and it is not the tipping point arrangement as a very popular concept with school people. I think they all would like to believe and do believe honestly in their own minds that a school — not only the community moves at a certain tipping point, but that the school itself is inferior once it gets a certain percentage minority group members, which I think is ridiculous.

But be that as it may, I recognize that a board in making decisions in these cases may be fighting a losing battle, and as I stated, I think the only secure solution and the only safe solution is to disestablish a dual structure in the entire system so that whites in fleeing or changing however you want to term it, meet the same situation wherever they go.

THE COURT: In other words, Doctor, do I understand you to say that the only real alternative, other than a constant adjusting and watching of percentages and so fourth, is transportation?

THE WITNESS: I think that would be involved in the final analysis, yes.

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[R. I. 1515-1516, Vol. 15] Q. Dr. Foster, we go now to your third example. If we can at this point, let's discuss the Roth and Roosevelt situation.

A. I believe we covered Highview and Gardendale. The Roth High School opened in 1959 which we can see on the large map to the west of the city.

Q. Do you want to step to the smaller map here, Dr. Foster. We have put up some new overlays. We still have 46C, the 1960 census, and 48D, the 1960 high school attendance boundaries.

A. That's correct. On this map Roth is located almost at the extreme west central portion of the Dayton System, and the boundaries are designated as I am pointing to the immediate east of the established 1959 opening zone for the Roth High School, we have Roosevelt High School adjoining Roth on the east. In terms of setting up these zones, the indications are that the Roth opening essentially took the whites, white students out of Roosevelt. The base census map indicates that the largest portion of Roth is in blue, almost all to the south and southeast and to the north is blue representing 25 to 50 percent black. All the other portion surrounding the school site itself is white indicating zero to 5 percent black, and on the 1960 census data, there is a small section to the east of the zone and to the southeast of the building which is in orange representing 50 to 75 percent black whereas at that time Roosevelt in 1959 or in the 1960 census was almost entirely red indicating 85 to 100 percent black. We know from Plaintiffs' Exhibit 1 on admissions that Roth opened with 662 pupils and that the same year Roosevelt decreased by 602 pupils from the previous year. We know that in 1963 our data indicates that Roth was 53.5 percent black whereas Roosevelt was still close to all black being 94.5 percent black. We also know or assume from Mr. Kirk's deposition that there were some considerations given by the Board to race in the establishment of the Roth zone and in the erection of the building itself.

Q. Dr. Foster, if you will follow with me my pencil, the boundary of the original Roosevelt High School zone included this optional area between Colonel White and Roosevelt and went all the way to the now boundary of the northern boundary of the Roth School; is that correct?

A. Yes.

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[R. I. 1518-1520, Vol. 15] Q. We have now placed up high school attendance boundaries 1965, Plaintiffs' Exhibit 49B. Dr. Foster, looking first of all at the large map since it may be more readily visible, what is the location of the old Dunbar School as it was established with the relationship to the Roosevelt School?

A. I believe it would be fairly close to the Roosevelt School and to the east.

Q. That is the present MacFarlane School building?

A. Yes, slightly to the south but mostly to the east.

Q. All right. What is your understanding about the operation of the old Dunbar High School?

A. My understanding is that it does have to do with attendance zones. It was a city-wide zone and it was all black in its student assignment and all black in its faculty assignment except for maybe one or two persons in a special teaching field, and I think it was driver training, and the old Dunbar High School, as I say, drew from the entire city extensively. It was an open enrollment school. I do believe that at one point there were certain grades assigned to it from one of the elementary schools close by. It was either Weaver or Willard. I believe in 1942 Willard and Garfield 7th grades were actually assigned to Dunbar rather than given a choice of attending it. Theoretically, at least, anybody could opt to attend or choose to attend the old Dunbar High School but in practicalities, only blacks chose to do so. I think it had a strong effect on the development of Roosevelt since it was very close to Roosevelt and the testimony in other evidence suggested there was some interplay between the two schools in terms

of blacks going to one or the other as Roosevelt became increasingly black in 1947 and was 15.3 percent black. In 1951, it was 31.5 percent black and in 1963, the year after Dunbar became MacFarlane, Roosevelt was 94.5 percent black.

Q. Dr. Foster, the earlier demographic map is now covered up, but there were white people south and to the west of the Roosevelt zone who walked past or walked longer distances to Roosevelt than they would have had to walk to Dunbar; is that correct?

A. Well, this is correct. They could have opted to go to Dunbar, but as I stated, I believe no whites did so.

Q. Well, when Dunbar was opened, was there any action taken identifying that school as a black school or white school aside from those you have already mentioned?

A. You mean other than making it a city-wide school and assigning black faculty?

Q. Well, I didn't realize you mentioned black faculty.

A. Yes, I had. I know of no other official action.

Q. What is the effect, and if you can reference it to your experience, of establishment of such a school in proximity to Roosevelt with the all black faculty?

A. Well, it was clear that the old Dunbar was an all black school. This allowed blacks to opt out of Roosevelt and go to MacFarlane — I mean to Dunbar, and essentially in my opinion accentuated at that time the whiteness of Roosevelt and the blackness of Dunbar.

Q. Do you know the date the old Dunbar School was built?

A. I have it, yes. If I am not mistaken, it would have been 1931. This was as of the date of original construction for MacFarlane.

Q. Assuming it opened during the thirties, are you aware, Dr. Foster, that it was the policy of the Dayton Board of Education to refuse to permit black teachers to teach white children in the system at that time?

A. Yes, I am aware of that.

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[R. I. 1522-1526, Vol. 15] Q. Dr. Foster, the record reflects that it was the policy of the Dayton Board of Education to refuse to permit white children to be taught by black teachers. What effect in terms of possible white attendance at Dunbar, does the combination of that policy, with the assignment of an all-black faculty which you have already testified to, to that school when it opened, have?

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A. I think potentially it is obvious, as I said before, that a white child could opt or choose to go to Dunbar, but for all practical purposes, white children didn't do this, and the fact that black faculty were assigned in toto to Dunbar would certainly indicate, I don't know whether legally or not, in terms of Board regulations, that white children couldn't go there, but on the face of it they wouldn't.

THE COURT: Dr. Foster, in your research and preparation for your appearance, have you found anywhere any evidence that white children were refused admission to Dunbar?

THE WITNESS: I don't believe so. I can refer to one thing from an exhibit.

THE COURT: If you would, please.

THE WITNESS: I believe it is Plaintiff's Exhibit 28, which is a memo by Superintendent French. I think this essentially answers your question. He says, "Dunbar has no boundary. Theoretically any child can elect Dunbar, but practically only Negro children attend."

THE COURT: You may proceed,

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Q. Dr. Foster, referring now to the criterion which you discussed, transfer of policy: Did you examine transfer policies in the Dayton School System?

A. Yes, I did.

Q. Now, you have already testified, I believe, with respect

to the statement in the minutes, as to the elimination or reduction of transfers at the time of the option of the optional attendance zones.

What did your examination of these policies indicate from that point?

A. There were some records in the testimony which I won't discuss involving this. There was one exhibit which is PX-16, which it states that in 1969 whites were given emergency transfers from Roosevelt to Stivers, and further than that, my examination led only to review of the transfer policy, or the freedom of enrollment policy, which was adopted in 1969, and as I understand it, has been continued through the present contained in Plaintiffs' Exhibit 16, which sets up a priority for transfers, and further examination of Plaintiffs' 16-D and 16-F gives some hard figures about the results of this policy since its inception.

Q. And what effect has this policy had on segregation that exists in the Dayton School System?

A. From my understanding of the data, I would say that the hardship and emergency clause in the transfer policy is pretty racially mutual. That is to say, that in 1972, according to Plaintiffs' Exhibit 16-F, 260 blacks —

THE COURT: Doctor, may I ask that you not quote from the exhibit. If you have referred to it, I assure you I will check it.

I'm intentionally interested in your conclusions. I'm not interested in the figures. They are available.

THE WITNESS: All right. My conclusions are that the hardship policy led to primarily whites moving to white schools and blacks to black schools.

My conclusion concerning Exhibit 16-D, which had to do with Dayton for the four years of the total transfers, indicate that in no cases, for all practical purposes, did whites transfer to white schools, and there was some movement of blacks to white schools.

BY MR. LUCAS:

Q. In terms of its effectiveness in eliminating patterns of segregation, do you have an opinion as to the effectiveness of the present policy?

A. I would classify it as minimal.

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[R. I. 1533-1540, Vol. 15] Q. Now, Dr. Foster, assume, if you will, though there is some difference in the testimony, that the policy of the Dayton Board of Education with respect to faculties, which I believe was one of your criteria, has been at least until 1951 of never assigning a black teacher to teach a white child, and then the pattern which you yourself noted through 1957 of the assignment of some black teachers to schools with large numbers of black children, and then the continuation of a pattern of relationship between a number of percent of black pupils and a number of percent of black teachers in schools until the current school year.

Do you have those facts at this point?

A. I think.

Q. All right. And then assume that there is a substantial reassignment of a faculty in the system. Again, there is some disagreement at this point as to whether or not there is still a relationship to density of black pupil population and the numbers of percent of black faculty.

But assuming that has been, let's call it, for the sake of this hypothetical, a perfect racial balance of faculty.

In light of that history, could you give us your opinion as to the effect, first of all, of that policy before the change, in terms of identification of schools as black or white and the effects of that change on the present situation in the Dayton School System?

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A. Well, my opinion is that this policy and practice before the change we assume took place, especially since it is in a northern district, would indicate that the Board is missing or

has missed a golden opportunity to prove that it does want to run a unitary system and remove segregation practices insofar as it is able, because the Board clearly, as I understand it, under most State laws, or all State laws, can assign teachers willy-nilly in the System wherever they want to. This is not a free choice matter.

Q. Is it also an annual option that the School Board has?

A. Yes, in terms of assignment. In terms of my opinion on what this does, as recently changed, assuming this, I would have to say that this does not remove by any means the vestages of a segregated system since it is only one component of several important aspects of a system segregated or desegregated. I think it is a very important component, and I think it is a step certainly in the direction of desegregation, and a very positive step.

But coupled with the other most important step of pupil assignment, so long as the schools themselves remain segregated, as they certainly do at this time in my opinion in Dayton, then the fact that teachers or staff being desegregated, if we assume that doesn't carry near the weight it would if the total desegregation process had taken place.

Now, if I can go a step further in my own opinion on that briefly: If in fact all these components were taken care of and we had a truly desegregated system, I would hazard that even then it is going to take a year or two for the identification of schools as black or white to be removed, but we haven't been doing that long enough to really know how long it does take. But I think that in some systems that have done this completely two or three or four years ago, they are very definitely and quickly no longer thinking of schools as black or white but as just schools.

Q. Dr. Foster, did you observe when examining the construction pattern and the additions to schools a pattern of assignment in that regard of faculty?

A. Yes.

Q. What was that pattern?

A. The pattern was largely one of assigning faculty by race according to the race of the school.

THE COURT: Mr. Lucas, could we now drop that issue? I think we have abundant testimony the School Board did assign black teachers to black schools and white teachers to white schools. Let me say I am aware of that. May I ask that we now abandon that for evidentiary purposes.

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Q. Dr. Foster, you used the term pattern. Is an important element the assignment of a particular percentage of black or white faculty to a particular school or is it something that can be considered in the context of a single school?

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A. I think I have already stated that these things have to be considered in the total configuration, and that assignment of teachers to any one school in the system is no indication of the pattern.

BY MR. LUCAS:

Q. Dr. Foster, I think we have covered your criteria.

A. As a matter of fact, we have not.

Q. I was looking for my list of criteria.

THE COURT: I do trust, Dr. Foster, that these are now different criteria that we have not covered.

THE WITNESS: Yes, and I think there is one left.

THE COURT: I would be most interested in hearing from the witness.

THE WITNESS: And some of these really fit in more than one example. They are overlapping so that it is simply a matter of judgment as to assigning them to one classification, but in the problem of great organization, I chose to put the establishment of the middle schools in 1971, and simply point out that these five middle schools which were established marked again a fine opportunity for the school system to illustrate that they were all for desegregated systems because one of the —

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THE WITNESS: All right. My conclusion is that the establishment of the middle schools in 1971 resulted in the establishment of four out of five schools that were clearly racially identifiable, therefore, increasing or maintaining segregation as opposed to availing the opportunity of decreasing it.

Q. Which were the four of five that you considered racially identifiable?

A. Cornell Heights, MacFarlane, Whittier, and Orville Wright.

Q. Now, Dr. Foster, in your review of these criteria and as you have testified, they are inter-related and somewhat interdependent. Do you have some general conclusions from your examination of these criteria?

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A. Well, in the interest of brevity, I think I could summarize each one of them with a sentence or two, but I will forego that arrangement and simply say that taken individually or in isolation, any of these criteria or different components of any of these criteria might suggest otherwise, but basically I think the examples and illustrations I have given and not summarized illustrate that the results of the Board in the last 20 years, mainly the period in which we have been reviewing in Dayton, the results have been to either increase segregation or maintain it when taking all of these things in a total pattern or configuration. In some cases, I think it was very clearly indicated, and I hesitate to use the word purposeful, but I think a better word that would describe my feeling about Board action in these matters is predictable, and I realize in saying that that hindsight is always better than foresight and much easier, but I think from going over the data and analyzing it, it is pretty clear in many cases the Board was aware of what was likely to happen, and I think the results as I have attempted to analyze them and display them have indicated what did happen.

Q. Dr. Foster, without going into any great detail, the

pattern of school construction, wasn't particularly one which you took into account in coming to your general conclusion?

A. Very definitely, particularly the decisions involved in the west side arrangements in 1953 and the building additions.

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[R. I. 1548, Vol. 16] A. Yes, I found in checking against this there were in building additions – I had stated there were 62 school additions to the present. Actually, there were 33 for a total of 95 additions since 1950. Eighteen of these 33 additional ones were made to schools which at that time were 90 percent or more black or white. This means out of the total of 95 additions, there were 78 additions made to schools 90 percent or more black or white. Seven of these additional 33 building additions were not made to this type of school.

Q. That's seven more than the 18 of 33?

A. That's correct, making a grand total of 9 which were not made to schools 90 percent or more black or white when they were added, and then 8 of these 33 additional I found I couldn't decide what their racial composition was at opening because of incomplete data. So, I classified those as uncertain. Those included additions to Drexel in '54 and '56 and additions to Greene in '57 and additions to Highview in '54, two additions to Irving, one in '54 and one in '58, and an addition to Jackson Elementary in '53, and an addition to Westwood in '60, and I think there has been a good deal of testimony and some exhibits about those schools as changing schools.

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[R. I. 1554, Vol. 16] Q. In terms of desegregation, Doctor Foster, in your experience with the field, does the dividing line between black and white communities take on importance in the discussion of the neighborhood school?

A. Well, it takes on importance for everything, not just a discussion of the neighborhood school, but the whole facet of desegregation.

Q. That would be a definable ethnic different neighborhood, would it not?

A. Yes.

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[R. I. 1556-1563, Vol. 16]. Q. Well, there would be the possibile exception of Webster, wouldn't there, which is a long, odd-shaped attendance zone?

Maybe I better point it out to you.

We have kind of got the name hidden by the Scotch tape here, but looking at the big map, Webster is an odd-shaped and elongated zone, isn't it?

A. Yes.

Q. But, of course –

A. But part of that is the golf course to the north, or whatever the flag represents.

Q. Right. As you can see from the map, the north end of it, which was annexed to the city, is largely undeveloped, and the Kitty Hawk Municipal Golf Course?

A. Correct.

Q. But in large part, with that exception, the various elementary school zones in the Dayton system are all compact geographical areas where students wouldn't have to walk more than a mile and a half or two miles to get to school, isn't that true?

A. I would say generally so, yes. Certainly nothing like the example I cited in Dade County of forty miles.

Q. No. There is no forty-mile neighborhood school in the Dayton system, is there?

A. On the other hand, I think what I tried to point out, the common perception of a neighborhood school is that a school is situated in a geographical center of an attendance area with all the boundaries equi-distanct as though it were in the center of a circle or center of a square, and very often, as I said, this just isn't true.

Q. Now, the next element that you just gave us in your definition of the perception of the neighborhood school concept

was a situation of the students being assigned to the nearest school, isn't that right?

A. That's correct.

Q. And that is true of the Dayton situation, is it not?

A. Not completely, no, sir.

Q. You are thinking of the Shawan Acres and the Veterans Administration system?

A. No. I think you misunderstood my point on that. All I am saying is that if the school is in fact located somewhere near the border of its particular attendance zone, then there will be children in the adjacent or contiguous attendance zone which will be closer to it probably than a school, a so-called neighborhood school to which they are assigned.

Q. Well, let's keep it to the elementary schools in the Dayton system.

All of them are, with, again, the possible exception of Webster, which is this funny-shaped zone, are all roughly in the center part of their attendance zones, are they not?

A. I think there would probably be some exceptions.

Q. Well, are there any exceptions?

A. If you would like me to go to the map, I think I could find some.

Q. Well, do you know of any without going to the map?

A. Well, I can see a little better. I haven't listed any, if that's what you mean, no, sir.

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A. Well, I can do it from here, if you want.

For example, in Shoup Mill, which is a little to the north central of the Shoup Mill attendance area, there are, according to my perception of the map and the streets and so forth from where I sit, people in the south part of Shiloh attendance area who are closer to Shoup Mill than they would be to Shiloh.

This is the sort of thing to which I am referring.

By Mr. Greer:

Q. Okay. And in your acquaintanceship with the City of Dayton, are you familiar with any of the traffic patterns or problems of accesses to any of these schools?

A. Some of them, yes.

Q. All right. Let's move into what you define as the third element of the common perception to neighborhood schools, and that would be that they are by and large walk-in schools so that a student doesn't have to avail himself of transportation to get there, isn't that right?

A. That's correct.

Q. And again that aspect of the definition would apply in large part to the Dayton system, wouldn't it?

A. I am not sure I understand your last question.

Q. The location of the schools in the Dayton System is such that they are largely walk-in schools for the students attending them; isn't that true?

A. I think at the elementary level that is generally true, yes, sir.

THE COURT: Dr. Foster, may I ask a question:

If there is no thought of having neighborhood schools or anything similar to it, why would you have more elementary schools than high schools?

THE WITNESS: Well, one answer to that, I think, Your Honor, would be a problem of attrition.

THE COURT: That much attrition?

THE WITNESS: And size of schools, generally.

THE COURT: The attrition can't be that great. It couldn't begin until at least the third year of high school, perhaps the middle of the second year.

THE WITNESS: You have two factors. One is attrition, and especially in cities you have a fairly large attrition rate starting at the 9th and 10th grade, very heavy in some cities in the 10th grade, when they come of age, but also the factor of what is considered to be an optimal size for the different grade classification schools, and there is a pretty consistent belief now by building people that in order to have a good high school, you have to have it a considerable size, say 2,000 to 3,000 pupils whereas elementary schools, the optimal size roughly would be 800 students. So in order to make up that

difference, you would have to have considering no attrition three elementary schools to cover one high school.

THE COURT: You are suggesting that no consideration at all would be given to the convenience of an elementary school in terms of this?

THE WITNESS: Oh, no, I am not suggesting that, because I think it is.

THE COURT: Then, isn't that an aspect of neighborhood school? Now, it may be that neighborhood is a bad term. It may have sociological problems, but isn't it true that school boards generally think of an elementary school as being closer than a high school geographically to a student's residence?

THE WITNESS: Yes, I would say so.

THE COURT: You may proceed, Mr. Greer.

Q. To continue with the walk-in aspect of your definition, I think we have covered the elementary schools as being essentially in the Dayton System walk-in elementary schools; is that correct?

A. I believe so, yes.

Q. When you get to the high school level, of course there are fewer schools and therefore, larger attendance areas; isn't that true?

A. That's correct.

Q. But by and large, the high schools in the Dayton System are also walk-in schools with the possible exception of Stivers and Patterson Co-op; isn't that so?

A. I would believe so although I can't remember the exact figures for '71-72 for example, and I haven't seen them for '72-73.

Q. And of course, Patterson Co-op is a school that has city-wide attendance because it is a vocational school?

A. That's correct.

Q. And while Stivers' boundaries since 1969 have involved a larger distance in that they have gone across the river and taken in Irving and Whittier Elementary areas, those areas are accessible from Stivers since Stivers is located right on

Fifth Street and Fifth Street is one of the streets that crosses the river and has a public transportation line; isn't that so?

A. I think so, yes.

Q. Now, I didn't really understand what I jotted down as the fourth aspect of your definition of the common perception of neighborhood schools, and that was that they represented a sociological neighborhood. What is a sociological neighborhood?

A. Well, I think the common perception is that schools still in fact, represent the classic description of what we would call a neighborhood, a group of people of like interests and who all go to not the same church but neighborhood churches together and go to a neighborhood shopping center, and who have neighborhood recreation and so forth.

Q. If we take what is possibly a very naive definition of a neighborhood to be simply people living in the same geographical area, that definition of a neighborhood would apply to any of the schools, wouldn't it?

A. Pretty much, and I think that has already been talked about in the testimony, yes.

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[R. I. 1590-1591, Vol. 16] Q. The one thing that the maps clearly show us in the Dayton situation is that there has been very little change in the attendance zones over the past 20 years, isn't that right?

A. I believe I agreed with that, yes, sir.

Q. All of the school attendance boundary lines have remained relatively stable for the past 20 years?

A. That's correct.

Q. And I think you have also indicated that that is especially true when you compare the Dayton situation to many other systems, such as Detroit, where you have made observations?

A. I think I made that reference, yes.

Q. And that is true, isn't it?

A. I would say so as a generalization, yes, sir.

Q. Another thing that just a glance at the map makes very clear in this case is that the optional attendance zones are all located approximately equidistant from the two schools that are affected by them, isn't that right?

A. You are saying equidistant from the site population of each of the options that can be selected to the total optional zone?

Q. That's right. In other words, they are in the middle area between the two schools that are involved?

A. Well, they have to be in the middle area between the two schools, but that is one thing; to say that and something else, that they are equidistant from the two sites.

Q. Now, I'm lost.

A. Well, I understand your original question to say do I agree that the optional zones in Dayton are equidistant to the schools which they serve, and by that I understood you to mean the school building sites and not the total attendance areas. If you are talking about the attendance areas, I would agree, yes, sir.

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[R. I. 1592-1593, Vol. 16) Q. To get back to attendance boundaries, Dr. Foster, there is one instance, is there not, where the Dayton School Board did manipulate a boundary all the way through the downtown area and across the Great Miami River into a relatively distanct part of town? I am referring there to the change in the Stivers boundary in 1969.

A. Yes. It is still contiguous to the Stivers zone, though.

Q. That's right. It doesn't jump over any other intermediate zones, does it?

A. No.

Q. But it does go from Stivers which is on East Fifth Street all the way through downtown Dayton and across the river and into the Irving and Whittier elementary zones on the other side of the river?

A. That's correct.

Q. But the effect of that boundary change was to bring more black students into what had been a predominantly white high school, wasn't it?

A. I believe it would, yes, if the students that were in the zones in fact wound up at Stivers, and I know no reason why they wouldn't.

Q. Have you made any independent check as to that boundary change?

A. I am aware of it, yes.

Q. That occurred in 1969, did it not?

A. I don't have the date, but the indication from my figures is that Stivers has increased in 1970 from 10.8 percent black to 12.3 percent black in 1971 and 14.0 in 1972.

Q. Now, in your testimony last Wednesday, you discussed with us three cases where schools were open involving changing zones: The Highview situation, the Gardendale situation, and the Roth situation.

A. Yes.

Q. Let's start with Roth. That high school opened in 1959 with a 25 percent black student population, didn't it?

A. Pardon me just a second. It opened in 1959 with what, sir.

Q. A 25 percent black student population.

A. I don't have that figure in my notes about what its opening percentage was.

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[R. I. 1597-1599, Vol. 16] Q. The school board in 1959 when it built Roth could also have tried to structure the Roth attendance zone in such a manner as to exclude black areas from Roth, could it not?

A. Presumably, yes.

Q. And instead when it drew the attendance zone for Roth, it included a large part of areas that are shown on the 1960 map as having a population density of 25 to 49.9 percent black and some area that is shown on the census map as being 50 to 84.9 percent black; isn't that right?

A. As represented by the blue and orange; right?
Q. That's right.
A. That is correct.

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Q. So that regardless of the effect that the setting up of the attendance boundaries may have had on Roosevelt, the setting up of those attendance boundaries at least assured that Roth High School when it opened would be a school with a mixed black and white population; isn't that true?

A. Well, I think I testified that according to the way I saw the map, Roth took all the area out of Roosevelt that had whites in it, and I think what you just said is true that it would be a mixed population.

Q. Can you go up to the board and suggest any kind of a boundary for Roth High School in 1958 that wouldn't have taken the white areas that are shown on the census map? It would be a wild looking bounadry, wouldn't it?

A. Not any wilder than many I have seen. You would simply have to run a dog leg to the went out of Roosevelt.

Q. So, kind of throw a dog leg over into the west boundary of the school system?

A. Into the blue and white area, yes. I think this is considered perfectly legitimate in school districting.

Q. Although there aren't any dog legs in the Dayton system, are there, with the possible exception of Stivers boundary change?

A. Well, I think the Stivers one is fairly compact, but because of the size of high school attendance areas necessarily, you do tend to get some peculiar configurations.

Q. Despite the apparent structuring of the Roth attendance zone to make it an integrated high school, movement of residential population after 1959 have turned Roth like Roosevelt into a predominantly black school; isn't that correct?

A. Well, I would agree with the second part of your statement but not the first part.

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[R. I. 1602-1615, Vol. 16] Q. By the same token, I suppose if we are looking back in history, it would be possible for us five or ten years from now to say that it is predictable that the location of Fairview High School made it inevitable that that school ultimately would become all black; is that right?

A. Well, Fairview High School was located sometime ago.

Q. But five years after Roth was located, there was still a mix of approximately 50 percent and 50 percent in the school, wasn't there?

A. Yes, but Fairview was constructed I believe, in 1930 which is quite a different situation than construction of Roth in 1959.

Q. Now, another school which you mentioned as involving changed zones when it was opened was the Gardendale School which was opened in 1957; is that right?

A. That's correct.

Q. In 1963 which is the first year for which we have information concerning that school, it was 7.8 percent black?

A. Correct.

Q. Now you testified, as I recall, that by looking at the maps, and let's point out the Gardendale School that we are talking about. You testified that from looking at the maps that by changing its attendance zone it could have been opened with more black students.

A. Right.

Q. If that had happened, wouldn't you be here today saying exactly what you have just said about the Roth situation, that that made it predictable that Gardendale would turn all black?

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A. You are asking if upon opening Gardendale had been desegregated to a greater extent?

Q. Let's say 25 percent to make it comparable to the Roth situation.

A. That this would have assured today it would be all black; is that what you are asking?

Q. That then the Board of Education would have been

doing something improper there because it would be predictable that if you opened up 25 percent black it is going to turn all black.

A. Well, I don't think I was tying my prediction to precisely the amount at which it opened, but in the Gardendale case, it is now in 1972, 78.9 percent black but as I see the opening of Gardendale in 1957, this again in the same token, I think, as I tried to explain Roth, Gardendale is sort of a holding position for a school that is less black than the surrounding schools. I am not sure apparently that you get my point.

THE COURT: I didn't, Dr. Foster. I don't think you responded to Mr. Greer's question, because this ties in with what I referred to in your last day of testimony as the horns of a dilemma.

If I understand your testimony in general correctly, there is nothing that a school board can do that isn't going to have a segregative effect unless it is to transport children?

THE WITNESS: Well, I don't believe that was quite my testimony. I think that ultimately you have to face the problem of transportation in a city such as Dayton, and to stabilize whatever effect school patterns have on residential movement, and I think they certainly have considerable. The two are tied in very closely together to stabilize this, and then ultimately you do have to involve transportation, and I think this choice was open to the Board at all these times that we are talking about.

THE COURT: Dr. Foster, if the school board opens a school that is totally white, it is perceived as a white school. If it opens a school that is partially white and partially black, and then as time goes on becomes more black, then they have opened a school that is in a holding pattern. So there really is no solution from your testimony as to what a school board can do. No matter what it is, there will be a position to take that it is a segregative situation, and this disturbs me.

THE WITNESS: Well, what I have tried to explain, and I have apparently been unsuccessful at it, is that I think that

the Dayton Board, as the black population grew from the center city and expanded, has in fact set up a sort of retreating situation where whites could have optional zones and earlier transfers and be in not white schools but in whiter schools than they would be if they went to the school to which they were originally assigned, and I think this is a fairly traditional pattern of Board action.

By Mr. Greer:

Q. Now, Dr. Foster, if what you said were true, wouldn't you expect to find many changes in boundaries as the population moved? And you don't find that in Dayton, do you?

A. Well, I think I explained that Dayton did not use that technique, but rather used the techniques of optional zoned and school building additions, which had the same effect, in my opinion, as changing boundaries. It is just a different way at getting at the same result.

THE COURT: Excuse me one moment, Mr. Greer.

Supposing instead of building Roth they had added to Roosevelt. That would have locked in the student population at Roosevelt, wouldn't it?

THE WITNESS: You mean the black student population surrounding Roosevelt?

THE COURT: Yes. They would be locked in, wouldn't they?

THE WITNESS: Yes. It would have created more capacity, yes.

THE COURT: That's a segregative technique, is it not?

THE WITNESS: In many cases it is, yes.

THE COURT: You may proceed, Mr. Greer.

Q. At any rate, Gardendale did have some percentage of black students in earlier years, didn't they?

A. That's correct.

Q. But not a large enough percentage that in your opinion it would become inevitable that Gardendale would become predominantly black as it apparently has?

A. I'm not sure of your question, but I'll say yes.

Q. All right. As I understood your testimony the other

day, your complaint about the Gardendale, if I could term it a complaint, and I probably shouldn't, was that it could have been opened with more black students in it?

A. That's correct.

Q. Now, you are, of course, aware, are you not, of the development of the Townview area in Dayton in the 1950's and the proposed annexation of this area to the city?

A. As a matter of fact, I am not, in any great detail.

Q. Are you aware of it in any detail?

A. Not enough to discuss it intelligently, no, sir.

Q. The Townview area was this area over here adjacent to where the Gardendale School was located, isn't that right?

A. If you say so, yes, sir.

Q. Well, if you accept everything I say as right, Dr. Foster, there is no need in having you here.

Now, do you know anything about it?

A. I said that I didn't know enough to discuss the situation.

Q. All right. And you don't have any idea of what the potential student population, at least in the minds of the school board and the administration, in this Gardendale area was when it was located, do you?

A. Could I stop just a second and look up something?

Q. Sure.

A. No, I don't. I would make the comment that I was curious about Gardendale in this connection because I don't think it has ever reached its full enrollment potential, and I wondered exactly why that was.

Q. The annexation of the Townview area has never taken place in fact, has it?

A. (Witness shaking head negatively.)

Q. You are aware, of course, that when Gardendale was built, it was built at least in large part to house the program for the mentally retarded for which the school board was responsible at that time?

A. I am aware of that, yes, sir.

Q. And the mentally retarded program continued in that location until shortly before 1970, didn't it?

A. I'm not sure of the exact date, but I believe that's close, yes, sir.

Q. Now, if we look at the Gardendale attendance zone, Gardendale School is located right on the west side of Gettysburg Avenue, isn't it?

A. I believe so.

THE COURT: Mr. Greer, I would like some more information about which you have just asked.

If Gardendale was used for mentally retarded, then almost by definition it wasn't an attendance zone school, was it?

MR. GREER: Not in that respect. Part of its classrooms were for the attendance zone here, but it also housed the mentally retarded program.

THE COURT: Do I understand that the figures that have been given, though, are for the total school or for just that portion that was the ordinary school?

MR. GREER: I believe they are for the total school.

Is that correct?

THE COURT: Mr. Lucas, can you help the Court on this?

MR. LUCAS: It is my understanding that one wing of the Gardendale School was leased for the mentally retarded children and that the figures that we have deal with the regular school.

THE COURT: Only.

MR. LUCAS: Only, yes, sir.

THE COURT: Thank you.

MR. GREER: Mr. Kirk has just corrected me on that, and that is true.

THE COURT: Thank you. You may proceed.

Q. If we look at the Gardendale attendance zone, we find that Gettysburg Avenue runs right down the middle of it, does it not?

A. Yes.

Q. And then Gettysburg Avenue also forms the east boundary of Residence Park to the south and of Carlson to the south of that, doesn't it?

A. Yes.

Q. Back in the time when Gardendale School was erected, Gettysburg Avenue was even then a heavily traveled thoroughfare, wasn't it?

A. I believe that's correct, yes, sir.

Q. There were no traffiic lights on Gettysburg near the Gardendale School, were there?

A. I have no idea sir.

Q. And as far as the residential portion that is toward the Westwood School District and was optional at that time, that was an area which had a good many problems of access to Gardendale, wasn't it?

A. I wouldn't know.

Q. Have you ever been in that residential area?

A. Yes, but not in 1957, when it opened.

Q. All right, there are still many cul-de-sacs in the area, are there not?

A. I believe that's correct, yes, sir.

Q. And to get over to Gettysburg Avenue, you have to walk through a lot of lots that are business and industry, don't you?

A. Currently, you mean?

Q. If that's all you know about, I guess that's all you can tell me about.

A. I would say that was true in the sixties, the early sixties, and the middle sixties.

Q. There were many areas —

A. And as far as I know, it is still true, yes.

Q. There were many areas that didn't even have sidewalks, isn't that true?

A. Quite possible.

Q. Do you know when traffic lights for safety and when sidewalks were put in on Gettysburg Avenue near the Gardendale School?

A. No, I don't, but I know there were pretty few traffic lights along Gettysburg in the early sixties, but specifically as to Gardendale, I couldn't respond.

Q. Now, part of the Westwood School District that was down in this cul-de-sac residential area was made optional to Gardendale when Gardendale was opened, wasn't it?

A. I have that as one of my optional zones in 1957.

Q. All right. And to make our conversation with each other a little easier for each of us and for the Court to follow, what I have put up here on the board is a base of Plaintiffs' Exhibit 46-D, which is the 1970 census map, and overlays of the elementary, 1957 zones, and optional zones, which is Plaintiffs' Exhibit 47-A, and the elementary 1970 zones and optional zones which is Plaintiffs' Exhibit 50.

Referring to that, why, we can look through the elementary seventy area into the 1957 lines and see the optional zone that we are referring to between Gardendale and Westwood, can we not?

A. I see it, y s.

Q. And that was a zone that was approximately equidistant between the two school locations, wasn't it?

A. I would judge so, yes, sir.

Q. If at any time you would find it easier to come up and look at the small map, why, Dr. Foster, feel free to do so.

A. Thank you. It appears to be from here, yes, sir.

Q. All right. Now, it had formerly been part of the Westwood zone, hadn't it?

A. I believe so, yes.

Q. And the problem of access from that area to the Gardendale area was the problem of Gettysburg and the cul-de-sac and the industries that we have just discussed, wasn't it, at that time?

A. I have no direct way of knowing that, but I assume that could have been a problem.

Q. All right. Then I think it was in 1970 that the optional area was removed and the boundary of Gardendale was extended to take in the optional area plus some more of the Westwood area, isn't that right?

A. It appears to be from the two maps, yes, sir.

Q. And are you aware that despite the 12 years of develop-

ment of this area with lights and sidewalks and more residences, that when the optional area was removed and the boundary extended there, it was still necessary to bus students from that area in order to get them up to Gardendale school?

A. No, I was not aware of that.

Q. Were you aware that the extension of the Gardendale attendance zone followed the transfer of the mentally retarded that had formerly been housed at Gardendale?

A. I assume from the date that it would have, yes, sir.

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[R. I. 1627-1643, Vol. 16] Q. Then, let's go to the optional zones where you spent a good deal of time on your testimony last Wednesday. You would agree with me, would you not, that even if you don't approve of optional zones as good administrative practice that they are an extremely widespread administrative device in school systems and that they often exist for the most innocent and legitimate of reasons?

A. Well, no, I don't think I would agree with that completely. I think they are becoming much less widespread than they were because in many cases they were used for segregation reasons. I think they are used for legitimate reasons, but I I think again administratively except on a very temporary basis they are bad news.

Q. All right, but let's go back to the fifties and sixties. They were very widespread, then, were they not?

A. In Dayton are you saying?

Q. No, throughout the country.

A. Most of the systems I have examined at that time — not most, but quite a few of them had them, yes, the big city systems especially.

Q. And a good many of them grew up with the idea that if there is no great administrative problem created, there is no reason not to let people go to one of two schools if it is equally close to go to either school; isn't that right?

A. That's a little complicated.

Q. Let me try to break it down. I live on Block A and I have got a school that is three blocks one way from me and another school that is three blocks the other way from me. So, as far as I am concerned, it is just as easy to go to one school as the other, and the reason optional zones grew up in educational systems at least in part is from the feeling that if it creates no great administrative problem to the school system, why not let Greer go to School A or School B.

A. I wouldn't agree with that.

Q. You wouldn't? In understanding optional zones, you would agree, would you not, that you have to consider many of the same safety and access factors that are involved in setting fixed attendance zones?

A. Well, I won't argue with Dayton's rationale for creating optional zones, but I think I stated this is the first case I know of access being used as a basis for the creation of optional zones. That's a new one on me, and I don't really see that there is, you know, a need to create an optional zone in this case. Why not assign the children one way or another and draw your line and then change the boundaries later when the proposed changes in the area come off. I think that would remove the possibility of your being questioned or being suspect in the creation of an optional zone especially if it has racial possibilities.

Q. Nobody was questioning optional zones back in the fifties when these were set up, were they, Dr. Foster?

A. Well, I don't know as a matter of fact.

Q. And the optional zones that appear in the Dayton School System are scattered to the east and to the north as well as in the west side of Dayton, aren't they?

A. I believe they are all over the system, yes.

Q. Now, in an optional area the option runs to all students who are living in that area regardless of their race, doesn't it?

A. It is supposed to, yes.

Q. And last Wednesday you didn't give us any testimony concerning the optional zones, for example, between Wilbur

Wright and Stivers and Stivers and Belmont that have existed in the Dayton School System. Do you find any significance in those options?

A. I didn't mean for the 15 I cited to be exclusive, but I characterized those, I believe, as one that have a good deal of variance in terms of composition between the two schools forming the option.

Q. Can you check your figures for us and tell us what the variance of racial composition was between Belmont and Wilbur Wright?

A. At what time, sir?

Q. At any time.

A. In 1972, this year, my figures give 5.2 percent black for Belmont and 9.2 percent black for Wilbur Wright.

Q. Take us back a few years, then, if you will.

A. In 1967, Wilbur Wright had 3.2 percent black and Belmont .1 percent black.

Q. And, if you will, go back another couple of years.

A. In 1963, for Belmont it was all white and Wilbur Wright was 3.3 percent black.

Q. So, throughout the period that you have referred to, there hasn't been any great variance between the student composition of Wilbur Wright and Belmont, has there?

A. Racially, I would say no, that is right.

Q. Do you know anything about why the optional zone between Belmont and Wilbur Wright was created?

A. I don't believe I reviewed that, no, sir.

Q. All right. Stay in the east end of Dayton for a minute. There is a green area that spans the Cleveland and some of the Horace Mann elementary districts, is there not?

A. Yes.

Q. And what does that indicate as far as racial composition is concerned?

A. Something like five to 25 percent, I believe, black.

Q. And right adjacent to that green area on the map there is an optional attendance zone, is there not?

A. There is one to the west. Is that the one you are referring to?

Q. Yes, there is a large one to the west and a smaller one which I guess just barely touches that over to the east.

A. That is correct.

Q. Have you made any studies of those optional zones and their effect?

A. I don't believe those were on my list, no, sir.

Q. Did you prepare the list or was it prepared for you?

A. I went through the board minutes that I had records of and picked out the ones that I thought had racial significance as I think I stated earlier.

Q. All right.

A. The only other ones that were not included in Plaintiffs' Exhibit 123 giving the dates in the board minutes were picked up by me on the maps. For example, elementary 57 has some which were not in the board minutes and I checked those out for racial differences.

Q. Do you find just from looking at the map any significance to the green area next to the optional area in east Dayton?

A. If I am not mistaken, that's the state hospital area.

Q. So, in fact, there aren't any black residents in that green area, are there, to your knowledge?

A. I wouldn't assume so except for the population of the hospital which I assume would not be on there.

Q. And the optional zone turns out to be a cemetery, doesn't it?

A. I believe if my memory serves me right, that is correct.

Q. What about these other elementary optional zones? There are four of them that now exist in east Dayton, aren't there?

A. Counting the two we just discussed, that is correct.

Q. And then there is one that now exists in north Dayton; isn't that right?

A. If you are referring to the Belle Haven-Fort McKinley zone, that is correct.

Q. And now there are only three elementary optional zones that exist in west Dayton, isn't that right? The Jackson-Westwood option and the two between Residence Park and Jane Addams?

A. I believe that is correct.

Q. In fact, the establishment of the middle schools in 1971 is the factor that contributed to the cleaning out of most of these optional zones, isn't it?

A. I am not certain, but it is obvious they have decreased.

THE COURT: Mr. Greer, may the Court accept that there are only eight elementary school optional zones at this time?

MR. GREER: I think that is correct, is it not, Mr. Curk?

MR. CURK: I believe that is correct.

THE COURT: Thank you.

Q. And by the same token, there are four high school optional zones, are there not?

A. I believe that is accurate.

Q. There were a couple other high school option zones on the east end involving Stivers, Wilbur Wright and Belmont that were cleaned out when the Stivers boundary changes were effected in 1969, isn't that so?

A. I believe so.

Q. Now, you have identified and discussed three high school optional areas. The first one that you mentioned was a small area that was created between Roth and Fairview in 1965; isn't that right?

A. That's what I have on my notes, yes, sir.

Q. And according to all the information that is available, there were no students that went to any schools in that optional area between 1965 and 1971; isn't that so?

A. Well, I think I testified that I understood it was a very small number and something less than five students, I don't have the date for that.

Q. If I could refer you to Defendants' Exhibit CL.

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Q. Am I not correct that according to this information there have been a total of three students attending either of these schools from this optional area and that all three of those students have been in the last two years?

A. That is correct, I believe.

Q. And that there were no students attending either high school from the optional area between 1965 and 1971?

A. According to the exhibit, that is correct, yes.

Q. Now, let's then move to the Colonel White-Kiser optional area. I think you told us on direct examination that in the four school years from 1967 through 1971, 102 white students from that area went to Kiser and 27 white students from that area went to Colonel White.

A. Those are the figures I had, yes, sir.

Q. And in the preceding five school years, from '62 to '67, there were 26 white students going to Kiser and 58 white students going to Colonel White?

A. That would seem logical, but my notes give '62 to '65, and I'm not sure what it is.

Q. You are missing a couple of years there?

A. Apparently. I may have made simply a mismark.

Q. All right. This optional area was created in 1962, was it not?

A. I believe so, yes.

Q. And all of the students in the area appear to have been white students, were they not?

A. I believe so.

Q. Colonel White appears to have been the school of choice of these students if we look at the figures as to who went where, at least up until the last four years?

A. I believe so, right.

Q. Then you gave us on your direct examination the student composition figures between Kiser and Colonel White for '67 to '72.

As of 1962, when this optional zone was created, both schools were predominantly white schools, weren't they?

A. Yes, that is correct.

Q. What were the percentages?

A. I have figures for 1963.

Q. That would be the year after the option was created?

A. Yes. Colonel White is 1.1 percent black, and Kiser is 2.7 percent black.

THE COURT: 2.7?

THE WITNESS: Yes.

Q. Then if we would jump five years after the creation of this option, up to the school year of '67-68, what would the student composition of the two schools involve?

A. My notes say that Colonel White was 8.4 percent black and Kiser 0.9 percent black.

Q. All right. Let's then move between the two options we've just discussed to the Colonel White-Roosevelt option.

As I understand it from your testimony, part of that option was created in 1951, and the rest of it came in 1957 or 1958?

A. Those are the dates I have, yes, sir.

Q. Both of those dates are, of course, a number of years before the creation of the Colonel White-Kiser option, isn't that right?

A. That would be correct.

Q. Am I correct also that in 1951-52 Roosevelt High School was only 31.5 percent black in student composition?

A. Those are my figures, yes.

Q. Now, if we look at this optional area on the map, you would agree with me, would you not, that the area north of Wolfe Creek has better access to Colonel White High School than to Roosevelt?

A. I understand from depositions and testimony that this really didn't make much difference in terms of mobility from students in that area, that they managed over the years to get back and forth with considerable ease, or at least they have managed.

I don't know what problems they got into, but at least there was a considerable flow across Wolf Creek. I would agree that simply looking at the map would indicate that is not any closer to Colonel White, but because of Wolfe Creek, and I guess the Tire and Rubber Company that is in the area, presumably it would be easier physically somehow to get to Colonel White.

Q. All right. Wolfe Creek, of course, runs along the southern boundary of the ultimate optional area, doesn't it?

A. That's correct.

Q. And the side branch of the Baltimore and Ohio Railroad cuts through West Dayton and then comes across Wolfe Creek and goes out to the west along the southern bank there, doesn't it?

A. I believe it does, yes.

Q. I'm sorry. Along the northern bank.

And also in that area, along the Wolf Creek is the Dayton Tire & Rubber Company, which has grown and expanded with the passage of years during the period we are discussing?

A. I believe that's correct.

Q. Now, originally this optional area was part of the Roosevelt attendance zone, was it not?

A. I believe so.

Q. And at that time Colonel White was only a two-year school which fed into Fairview High School, which was a considerably greater distance from the optional area than Roosevelt High School?

A. That's correct.

Q. Now, in 1951 the first part of this optional area was created, isn't that correct?

A. That is my understanding, yes.

Q. And that part of the option was the northern part, which is bounded on the east by Salem Avenue, down to Superior, and then over across Superior to Rosedale, and then down to Wolfe Creek, wasn't it?

A. I believe that's accurate, yes.

Q. Do you know why it came down to Wolfe Creek on the west?

A. I don't recall reading anything about the reason.

Q. Well, are you aware of the fact that the Super Packing Company's Stockyards were located on the south side of Wolfe Creek at the western end of this optional area?

A. I don't believe I ever have seen reference to that, no, sir.

Q. Have you made any attempt to investigate why these optional areas in the Dayton System were created aside from looking at the maps and the exhibits?

A. Considerable, yes.

Q. All right. Then you are, of course, aware that as far as the northeast part of this optional area created in 1951, the City Transit Company had public transportation on Salem Avenue which would get them up to Fairview High School, aren't you?

A. That seems reasonable, yes.

Q. And you are also aware that on the west side, which is where the optional area went down to Wolf Creek, by 1951 the City Transit Company had a gasoline bus that went up Philadelphia Avenue and could get the students to Fairview after they completed Colonel White?

A. I don't believe I saw reference to that, but it is certainly feasible.

O. All right. And those are the kinds of things that you would take into consideration on this optional area, aren't they?

A. You mean in establishing it?

Q. Yes.

A. Could be, yes.

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[R. I. 1642-1643, Vol. 16] Q. And then the change that came in the optional area came about at a time that Colonel White changed to a four-year high school, so that it was no longer necessary for the students to matriculate from Colonel White up to Fairview?

A. That's correct.

Q. And the only change that was effective at that time was to carry the rest of the option down to the natural boundary of Wolfe Creek, and the change really only involved a couple of city squares, didn't it?

A. In terms of actual residential area, you mean?

Q. Yes.

A. I believe that is reasonably accurate, yes.

Q. All right. Now, at the time these few squares were added to the optional area so that all of the students in that area could go either to Colonel White or to Roosevelt High School, the population of the optional area was predominantly white, although there were some blacks living there, isn't that true?

A. I believe that's correct, yes.

Q. The optional area itself hasn't changed at all, has it, insofar as its boundaries are concerned, in the fifteen years that have passed since 1957?

A. I don't believe so, no.

Q. The population of the optional area, however, has become predominantly black, isn't that true?

A. I would judge so, yes.

Q. And if the school board had wanted to use this optional area as a device for keeping blacks out of Colonel White High School, it could easily have transferred the entire area back to Roosevelt with hard boundaries once the population changed, couldn't it?

A. Well, I think under the freedom of enrollment business they would have been able to go in anyway if there had been capacity in Colonel White.

Q. Freedom of enrollment didn't come in until 1969, did it?

A. That's right.

Q. The effect of this optional area has been to bring more black students to Colonel White High School, has it not?

A. Only in the past three or four years has that had any effect.

Q. Since 1968?

A. That's my understanding, yes, sir, my figures.

I don't have figures between '63 and '68.

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[R. I. 1645-1659, Vol. 16] Q. All right. And the first years for which we have figures after 1951 is '63-'64 with respect to these two schools, isn't it?

A. I believe so, yes.

Q. What were the student compositions of Jackson and Residence Park in 1963 and 1964?

A. Residence Park was 80 percent black in '63, and Jackson was 98.5 percent black.

Q. Thus these thirty some students from the VA over this period of years, or at least those who were there in '63 and '64, were attending a predominantly black school, weren't they?

A. Yes, I think so.

Q. Now, you also mentioned on Wednesday the two optional areas between Residence Park and Jane Addams, did you not?

A. That's correct.

Q. And those two optional areas still exist today, do they not?

A. Yes, I believe so.

Q. The reason for those options is a specific problem of difficult access, isn't it, or do you know?

A. I don't believe I have any indication of exactly why they were established.

Q. Have you made any investigation to find out for yourself why they were established?

A. The same sort of investigation I have told you already.

Q. Through the exhibits?

A. Yes.

Q. The interesting thing that you found in going through the exhibits on these two optional zones was that the shift of populations between the two school attendance zones had changed the compositions of the schools while the option had remained the same, is that right?

A. I think what you are saying is accurate, as I understand it. In '51 Residence Park was all white, Addams was 29.3 percent black, and then in the second option, which was established in 1960, Adams was 41.6 percent black while Residence Park was 80 percent black.

Q. All right. So that this is a situation where the optional zones have remained the same for ten to twenty years and they represent now a choice between two predominantly black schools, is that correct?

A. They didn't in 1963.

Let's say they didn't in '60, when the second option was established, because at that point there was a considerable difference in racial composition between Addams and Residence Park.

Q. Well, at one point in time one school was blacker than the other and at another point the other school was blacker than the other, isn't that true?

A. Which is precisely why the optional zones may have been set up.

Q. When you say may have been set up, you have absolutely nothing factual to support that kind of a comment, do you, Dr. Foster?

A. We have no data of the pupil movement between those two optional zones, that's correct.

Q. Nor do you know the population in those two optional zones?

A. Only what we can judge from looking at the census underlays.

Q. Nor have you made any effort to find out what it takes for a person living in either of those optional zones to physically get their body to Jane Addams Elementary School or to Residence Park Elementary School?

A. I think I testified earlier that I see no reason why an optional zone has to be set up because of this criterion, that if there is difficulty in a person having excess to a particular school, then why not draw the fixed line so that he can have access to the school that is more convenient, as the law says.

Q. Now, another one that you testified about on Wednesday was the Edison-Jefferson option, which is again one of these Wolfe Creek options in the same area as the Colonel White-Roosevelt, isn't it? Isn't Edison-Jefferson up here?

A. Yes.

Q. All right. So without going through all of those facts again, is it not true that by 1967 Jefferson was 50.5 percent black and Edison 95.9 percent black?

A. Which year was that, sir?

Q. 1967.

A. All right. But I think I included that in the group of options that were established at the same time as the west side movement all took place and included that in my analysis of that total area.

Q. By 1969 Jefferson was up to 80.3 percent black, wasn't it?

A. By 1969?

Q. Yes.

A. That's correct.

Q. Do you have any data on the students living in that optional area at any given time?

A. I don't believe we do, no, sir.

Q. Then you mentioned –

A. You mean in terms of movement from one school to the other?

Q. Right.

A. No, I don't believe we do.

Q. Then you mentioned the Emerson-Irving option, which was set up, was it not, in 1965 when the old Central High School was closed?

Here we have Emerson and to the west Irving.

A. I believe that's accurate.

Q. And the Central School District at the time it closed, at least in this part of it, contained almost no students, did it?

A. I don't know the exact figure, but I think it was a very minor number.

Q. In fact, this optional area was cleaned out by the Interchange at Route 35 and by the Interstate and by the taking for the rest of the land for the building of Sinclair College in that period of time?

A. That's to the best of my knowledge, yes.

Q. So at that time that was created, there were almost no students there, and at the present time there are no families living there, isn't that right?

A. I would believe so.

Q. Now, let's go to another one of these optional areas that you found significant.

A. Not necessarily.

Q. Belle Haven and Fort McKinley was an optional area that you listed in your testimony last Wednesday.

As I understood your testimony, you indicated that that was established in 1972?

A. That's the note I have on my sheet, yes.

Q. Where did you get that information?

A. Well, I don't have the source, but where I don't list in my other ones the source is PX– Plaintiffs' Exhibit 123 of the Board minutes.

Q. This is the optional area you are referring to, are you not, up in the corner of Fort McKinley, between Fort McKinley and Belle Haven School?

A. I beg your pardon a second.

I did state earlier, I think, on two occasions that I either got these from PX-123 Board minutes or from the maps themselves, and it may have been that I got this simply from a map in my analysis and found a disparity in the racial composition of the two attendance zones.

I'm not certain frankly from which source I got it.

Q. All right. Well, if you got it from the maps, and we look at the 1965 elementary school maps that were drawn by the Plaintiffs for this case, I don't know if you can see it from there, but it shows the same optional zone, doesn't it, in 1965?

A. I believe so. That's correct.

Q. And in fact that optional zone was set up when Belle Haven School was built back in 1954 and 1955, wasn't it?

A. Well, apparently what I have is inaccurate, so if you state that, I would assume that's correct.

What year did you say, sir?

Q. The Belle Haven School was built in 1954, wasn't it?

A. That's my information, yes, sir.

Q. All right. So I have flipped up this map that we have on the board to look at the elementary '57 zone, and it shows the same optional area, does it not?

A. Yes.

Q. Have you made any study of the access for students from that area, between Belle Haven and Fort McKinley Schools?

A. Not specifically, no, sir.

Q. Neither of those schools had any black students in them for 1967, did they?

A. It's entirely possible that that is accurate.

Q. Well, check me out on it.

A. I will.

Before what date did you say?

Q. 1967.

A. Belle Haven in 1967 is listed at 0.3 percent black, so that sounds reasonable. And Fort McKinley in 1967 is still no black.

Q. All right. Now that leaves me with only three optional areas from your testimony of last Wednesday, and that's the three optional areas that were created in the early fifties in connection with the shrinking of the Garfield, Willard, Wogaman boundaries; isn't that right?

A. I am not sure I know what you mean when you say that leaves you with only three.

Q. Well, I am trying to touch upon each of the optional zones that you covered in your testimony with us last Wednesday, but I want to make sure that I don't miss any.

A. Well, I haven't been checking them off as you went along, so your accuracy would be moreso than on mine on that.

Q. Well, I think I am left with just three. Before I turn to them, though, let me spend a couple of minutes with you on the closing of Willard and Garfield that took place in 1962. Now, with the closing of Willard and Garfield, the

students were reassigned in large part to MacFarlane which had been the old Dunbar High School which was just two blocks west of Garfield School and just four blocks north of Willard School; isn't that right?

A. I believe that's accurate, yes.

Q. Now, some students were assigned to Miami Chapel School which bordered the district on the south and some were assigned to Irving School District which bordered the old district on the east; isn't that true?

A. I believe that is correct.

Q. No problems of access for those children for any of those schools; isn't that right?

A. I wouldn't know specifically about that, but if you say so.

Q. All right. That's what I do say if you are willing to accept it.

Now, you indicated in your testimony that the Board could have reassigned these students to Patterson, Hawthorne, or Longfellow School, and then you made a few corrections of the distance factors in your testimony this morning.

A. That's correct. I think I said those would be illustrative of places where they could have assigned them.

Q. All right. To get to the Longfellow School which is located out on Salem Avenue, is it not?

A. Yes.

Q. The students would have to cross Third Street which is a busy east-west thoroughfare, would they not?

A. These are black students and they have amazing ability to get around, sir.

Q. All right. They would have to cross the Grace Green District, would they not, or the Edison District?

A. I believe the Edison District, not the Greene District.

Q. Where are the bridges they would get across Wolfe Creek?

A. I am not sure of your question. You mean they would have to go at some point through the Greene area to get to Longfellow?

Q. Either through the Grace Greene area or through the Edison area.

A. To get across the creek; is that what you are asking?

Q. Yes.

A. I believe that would be correct.

Q. And they would then have to cross Wolfe Creek and half of the Longfellow District to get up to Longfellow School, wouldn't they?

A. Yes.

Q. Longfellow School is now 64.1 percent black, isn't it?

A. In 1972?

Q. Yes.

A. 64.1.

Q. Now, Hawthorne was another school that you mentioned as a possibility. Again, like Longfellow, it is not contiguous to the old school district, is it?

A. No, it isn't.

Q. And in order to get to it, you would have to travel the same path that you and I have just described and continue on across Interstate 75 which I understand would represent no problem to people of agility and go on up to Hawthorne which is located in north Dayton?

A. Well, that's true except I might suggest that as was done in the other part of the west end business, you could shift zone lines so that you move the southern zone lines up and then the northern zone lines up and then you wouldn't have necessarily a noncontiguous situation at that point.

Q. Well, you are referring to the Stivers change?

A. No. I am referring to the total west end situation. All I am saying is that in order to assign these children to Longfellow or Hawthorne, you don't necessarily have to establish noncontiguous attendance areas where they would be jumping over.

Q. You can run a dog-leg or something like that?

A. What you simply do is what was done in the west end which is shift the southern and northern boundaries of the schools we are talking about.

Q. While we are on the subject of trying to get people from down here in what is the MacFarlane area up to Hawthorne and Longfellow, unlike the situation of going across Fifth Street to get over to Stivers, there is no public transportation between those two areas, is there?

A. I am not certain about that.

Q. And while we on the public transportation of Dayton, we talked a little bit about the gas bus on Philadelphia Drive that went up Fairview and the electric bus on Salem Avenue and, in fact, to get from the Colonel White optional areas down to Roosevelt as opposed to walking, you would have to take the Salem Avenue bus to downtown Dayton and transfer onto the Third Street bus and then come back out west across the river out Third Street to Roosevelt, wouldn't you, in all these periods?

A. I am obviously not certain, but I believe I remember reading something to that effect.

Q. All right. Now, the other school that you talked about in connection with the closing of Garfield and Willard was Patterson Elementary School which is over in the southeastern part of the city, isn't it?

A. Generally, yes.

Q. Located on Wyoming Street?

A. Well, I am not certain, but if you say so.

Q. All right.

A. I can step to the map and verify it if you like.

Q. All right, if you would like to, fine.

A. Yes, that is correct.

Q. Now, in order to get over to that school from the area that is under consideration, a school child would have to get across the Miami River either up at Third Street or at another crossing, go to downtown Dayton, transfer onto a southbound bus on Main Street, go out to the Fairgrounds at Miami Valley Hospital and then walk east on Wyoming until they got to the school, wouldn't they?

A. Well, I am not certain of all that. I think an alternate

way, if transportation was necessary, the Board could provide transportation with a school bus.

Q. All right. In order to really make any of these proposals that you are talking about back in 1952 effective, it would have been necessary for the Board to provide transportation; isn't that so?

A. I don't think so in all cases, no.

Another possibility which I didn't include in my three examples would have been Whittier which seems to be pretty close in to MacFarlane. Emerson, of course, is about the same shape as Patterson in terms of distance and accessibility, but basically, I think in almost all desegregation cases and certainly in this one natural barriers form a back seat in terms of considerations of assignment. They do have to be considered and obviously you don't send people across them just for the sake of doing it, but there are other factors to be considered besides access, and when I think you are weighing something like possible desegregation of schools, you sometimes have to bend your access criteria a little bit.

Q. Do I take it from your answer that you want to throw away the examples you gave us last week and give us some new examples of what possibilities that could have been done in 1962?

A. No. I am sticking with the ones I gave you. I said they are simply examples.

Q. Now, let's drop back another ten years and go to the last subject I want to examine you on, and that is the situation in 1952 with the shrinking of the Garfield, Willard, and Wogaman boundaries.

A. All right.

Q. As I understand it, you found that to be perhaps the most significant of the various things that you discussed with us.

A. Well, it was certainly significant in my opinion, yes.

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[R. I. 1663-1674, Vol. 17] Q. Plan A was simply to add on to the existing schools to service the growing number of students; isn't that right?

A. Well, yes, that is correct basically.

Q. And we will have to look at Plaintiffs' Exhibit 47A which is the elementary schools of '57 to locate Garfield and Willard, won't we, since those schools were discontinued in '62?

A. Yes.

Q. Both Garfield and Willard according to all the information we have had entirely black student populations back in 1952, didn't they?

A. The schools, yes.

Q. And, of course, simply adding onto those existing schools would have further impacted all black student bodies in those two school districts, wouldn't it?

A. I should think so, yes.

Q. The Board elected not to follow Plan A in December of 1952, didn't they?

A. Yes.

Q. As an alternative, they adopted what they described as Plan B, and if I understand that plan correctly, the all black Wogaman District was shrunk by additions to Jackson to the north and to Weaver to the north and east.

A. That is correct.

Q. At that time, Jackson was 35.9 percent black, wasn't it?

A. 1951, yes.

Q. And Weaver was 67.6 percent black?

A. Yes.

Q. So the shrinking of the Wogaman boundaries would cause black students who had been in those boundaries, at least some of them, to experience interrelationships with white students in the Jackson and Weaver Schools?

A. Yes.

Q. Then, the all black Garfield School District was shrunk by additions to Edison to the north and to Irving to the southeast, was it not?

A. Yes.

Q. In both situations, we are talking about other districts that were contiguous and immediately adjacent, aren't we?

A. I believe so, yes.

BY MR. GREER:

Q. And in the 1951-52 school year, the Edison School District had a student body that was 43 percent black, didn't it?

A. That's correct.

Q. And the Irving School District had 46.6 percent black?

A. Those are the figures I have, yes.

Q. So, the effect of shrinking the all black Garfield District was to permit black students in that district to experience interracial experiences with white students in the mixed schools of Edison and Irving?

A. That's correct.

Q. Now, as part of the shrinking of these school boundaries, in December of 1952, three triangular optional stones were created, isn't that right?

A. I think six were created altogether at that time.

Q. I'm talking about in this particular area of Garfield, Willard and Miami Chapel to the south, which was a relatively new school.

A. Well, which would those be?

Q. Well, let me run through them with you.

There was a triangle of urban —

A. I wonder if I might step to the map?

Q. Sure. That might be much easier. Why don't I give you the pointer and I'll get back to the platform.

Let's start from the north.

There was a triangle of Irving that was made optional to Willard, isn't that right?

A. Correct.

Q. And that would mean that the students in that area could continue at Irving or go to Willard, which was an all black school?

A. That's correct.

Q. And then just south of that a triangle of Willard was made optional to Whittier, isn't that right?

A. A triangle of Willard optional to Whittier?

Actually, this is the '70 census data. I think it would help me at least if we had the '50 census data under here. I wonder if we could do that.

Q. If you want to do it, that's fine, but I'm simply asking you about the attendance boundaries here.

Where is the '50 census data? Why don't you put it up?

A. All right, sir.

Q. Does that help you visualize the three optional zones that I'm talking about?

A. It helps me get a little better perspective of what is underneath them, yes, sir.

Q. Now, the second one was a triangle of Willard that was made optional to Whittier, isn't that right?

A. That's correct.

Q. And in '51-52 Whittier was 29.9 percent black in its student population, wasn't it?

A. Correct.

Q. And that optional zone made it possible for students in the all black Willard area to go to a mixed school, that school being Whittier?

THE COURT: Willard at this time was a hundred percent black, is that correct?

MR. GREER: That is correct.

BY MR. GREER:

Q. Is it not, Dr. Foster?

A. Well, the school was. Presumably any whites who were in the Willard attendance zone would also be able to go to Whittier.

I don't think there is any indication that the attendance area itself had only blacks in it.

Q. Well, you don't have any idea whether any of these three optional zones were all black, all white, or mixed, do you?

There isn't any information on that point?

A. No. But I think I testified that transfers were in effect up until 1951, and then the optional zones were created shortly after that, and there has been some testimony and so forth in the case that there were whites in Wogaman and in Willard and Garfield, and the census map of '50, in that, Willard and Garfield are both not in the red yet but in pink. So I think that this is a matter that isn't clear one way or the other.

Q. All right. Any transfer policies were stopped in 1951, isn't that right?

A. I believe that's right, yes, sir.

Q. And what are the 1951-52 figures for Garfield and Willard?

A. Schools were a hundred percent black.

Q. All right. Now, if we go down to the third optional area in this row, it is a triangle of all black Miami Chapel that was made optional to 29.9 percent black Whittier, isn't it?

A. That is correct.

Q. Now, Miami Chapel actually didn't come into being until '53, did it?

A. That's right.

Q. So that would be part of Wogaman back before the building of Miami Chapel?

A. That's correct.

Q. And according to the 1951-52 school years, Wogaman was all black, wasn't it?

A. The school, yes, sir.

Q. Thus this optional area would permit students in the all black Wogaman, or Miami Chapel School District, to attend the mixed school at Whittier?

A. Yes, but when you say that, you are inferring that the students in the optional zone would be all black, and I don't think there's any reason to believe that at all, because the '50 map shows the area to be green, and on the contrary, I would expect some of them to be white.

Q. Well, but you don't know either, do you?

A. I think I said that.

Q. We are both in the dark as to knowing whether the students in those optional zones were 100 percent black or a mixture of races, isn't that right?

A. That's correct.

Q. So let's look at some other facts concerning those three optional zones. They are all in a row, aren't they?

A. Yes.

Q. On a diagonal?

A. That's correct.

Q. The main branch of the B and O Railroad comes into Dayton along there, doesn't it?

A. Yes.

Q. And also the main branch of the Pennsylvania Railroad comes through Dayton on the other side of the river, comes into that same area, doesn't it?

A. I can't find it on the small map.

Q. Let's go to the big map. Maybe I can help you.

If we go to the west bank of the Miami River, you can see on the map the main branch of the Baltimore and Ohio paralleling the west bank of the river and then going up through this area where the three optional zones are, can you not?

A. That's right.

Q. And then if we look at the east side of the Miami River, you can see the Pennsylvania Railroad tracks going up to the river past a large switching yard at Frigidaire and crossing the river into this same area, those three optional zones, can you not?

A. Well, they aren't on the optional zones as the B and O is. That's why I couldn't find them on the other map. They are to the east of the line you described.

Q. Do you want to look underneath the overlay on the other map to find out just where the Pennsylvania tracks are in that area?

A. Well, if I surmize correctly, coming from the direction

of the south center part of the map and going north, this would be the tracks to which you are referring, right?

Q. Yes.

A. All right. Once they reach the school zones or school lines, they continue to go in a northeasterly direction.

So as I read the map, the tracks would all be to the east of the optional zones, which we are talking about and which do fall on the B and O line.

Q. All right. Now, the main branch of the B & O provides one side of the triangle in each of those three optional zones, doesn't it?

A. I think that is correct.

Q. And then there is a side branch of the B & O that swings off to the west to form another side of the triangle in the central of those three optional zones?

A. You have lost me on that. Perhaps we can go back to the big map.

Q. All right. This is the side track of the B & O that branches off to the northwest there and then crosses Wolfe Creek to go along the northern edge of Wolfe Creek, doesn't it?

A. And how did you describe that in relation to the zones?

Q. Isn't that part of the Whittier-Willard optional zone, the middle of the two zones?

A. Would it be the northern boundary of the middle optional zone?

Q. I believe that is correct.

A. It is a little confusing, but I think that seems accurate.

Q. Have you checked the boundary descriptions for these optional zones in your review of this material in preparation for testifying?

A. Not all of them, no sir, not these I did not. I did the high school ones.

Q. Before you testified, were you aware that these three optional zones were related to the railroad tracks that go through Dayton and that area?

A. I was not, no, sir.

Q. Railroad tracks present a safety factor that would have to be considered in the drawing of attendance lines, do they not?

A. In the drawing of attendance lines, yes, sir.

Q. All right. I think you can go back to the stand.

(Witness returns to stand.)

BY MR. GREER:

Q. Now, the shrinkage of boundaries in the Garfield, Willard, Wogaman area which were made two years before 1954 were purposely made according to all the records that we have by the Dayton Board of Education in an attempt to reduce the racial concentration of minority groups in those three schools; isn't that true?

A. I think that's their allegation, yes.

Q. Now, with the advantage of hindsight here in 1972, we can see that their efforts were doomed to frustration, can we not?

A. Well, failure would be a better word perhaps.

[R. I. 1679, Vol. 18] THE WITNESS: Well, I think you do what you can in a situation like this, and I think we suggested some of those things of making different choices in terms of boundaries and in terms of additions, and I think the Board took the worst possible move that it could in this whole west side situation and, in fact, hastened the impaction of this area and made it quite clear to all concerned that this is where it was headed, but basically I think I would agree with what has been said that as it does work out in fact in some cases, this may be simply a delaying tactic, and I don't think that anybody knows that when you are doing it. You can guess and make predictions.

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[R. I. 1683-1687, Vol. 17] Q. Dr. Foster, did you testify, and I understand that you did testify, that in your opinion what was done in the west side determined or communicated what was intended to happen in that area? Was that your testimony?

A. I believe it was, yes, sir.

Q. Dr. Foster, let us assume that instead of making the changes that were indicated, for example, carving out – I believe this Miami Chapel-Whittier option was carved out exactly from the Wogaman zone, that portion in Greene, is that correct?

A. I believe that's what we testified to, yes, sir.

Q. Instead of doing things like that, Dr. Foster, if they had taken white children from many of these areas and assigned them to Wogaman instead of leaving a cored area of black schools, if they had assigned 60 percent of the enrollment as white students to Wogaman and 60 percent of Willard's enrollment is white, and 60 percent of Garfield is white, and then taken the black students from those schools, whether they shrunk the boundaries or adjusted them in other manners, and assigned them to other schools in this area, would that have changed the perception of what was intended to happen in there?

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A. Well, I think this is the crux of what I have been trying to say. So far as I know, this characterized the duality of the date and system in that in my analysis I remember no place where white students to any degree were in fact assigned to black schools, and at the point that a system begins to do that, then I think they are serious about desegregation.

BY MR. LUCAS:

Q. Would that in your opinion have any effect on the stability, in terms of the change in the area? Assume an assignment of a substantial number of whites to those schools.

A. Well, to the extent that school patterns and residential action interreacts, I think it would, yes.

Q. The Court also inquired, Dr. Foster, about the question of other remedies.

What effect, if any, does school construction, selection of alternate locations for schools, and school additions have on the racial composition of the schools?

A. Well, I think I've testified that in my opinion the building additions that were used in Dayton by and large in a sense took the place of changing zone lines in terms of maintaining existing racial patterns and compacting them.

Q. Are you familiar, Dr. Foster, with the Nashville plan, where the court forbade the construction of any additions to the outlying white schools which were not desegregated under the plan?

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A. Yes, I am familiar with the Nashville plan.

BY MR. LUCAS:

Q. And what effect would such policy of restricting construction of predominantly white schools have in the context of a system-wide desegregation plan?

A. Well, it essentially makes it more difficult for whites to take advantage of spaces available in the suburban areas.

Q. Now, Dr. Foster, in terms of the cross examination about the criterion, the what you call common perceptions of the neighborhood school, you testified that the walk-in school was one of the perceptions, is that correct?

A. That's correct.

Q. In the State of Ohio, and I believe your testimony was this, that between 40 and 50 percent of all children ride to school on a school bus.

Does that indicate a neghborhood pattern of attendance in the state, or what does it indicate?

THE COURT: Mr. Lucas, that question really is quite deceptive.

Would you restate that in terms of the percentage that are bussed in metropolitan areas?

I'm a native of Ohio. I'm quite familiar with the extensive bussing that goes on in rural areas.

Dr. Foster observed at one point of the consolidation procedure that this is well known in the State of Ohio, but that figure standing alone really has no meaning.

It had no meaning when Mr. Greer mentioned it. But I would be interested to know of similar information in metropolitan areas.

Do you know, Dr. Foster?
THE WITNESS: I'm afraid I don't.

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[R. I. 1696-1700, Vol. 17] Q. Between what peaks? Do you know what the top and bottom was? Do you know what the maximum was?

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A. The top, I believe, was 55 percent black and the bottom was around 27 percent black.
By Mr. Lucas:
Q. Dr. Foster, you were examined at some length about facilities identifying schools.
A. Very definitely.
MR. LUCAS: I would like to make reference to Page 1383 et seq. of the transcript.
By Mr. Lucas:
Q. Now, turning to the construction of the Roth High School, Dr. Foster, I believe in direct examination you were asked your opinion of the effect of the construction of Roth on Roosevelt High School; is that correct?
A. I believe that's correct, yes, sir.
Q. And your testimony was that it took the whites out of Roosevelt, and do you know what else was done approximately the same time in terms of school construction at the high school level in Dayton?
A. Well, Roth was up in 1959 and then I think something that would affect this situation would be the opening in 1960 of Meadowdale with the eventual capacity of 2980 children including north of Roth, in the northwest section of the district.
Q. I believe that was built in 1960 with 48 classrooms?
A. And an addition of 39 in 1967, yes.
Q. Dr. Foster, Mr. Greer discussed with you possible alternatives to the building of Roth and to the placement of Roth attendance boundaries. What opportunities in your

opinion were present with the construction of that much additional high school capacity within the two-year period?
A. Well, I am not sure I understand your question, but I think I do and that is that if you would have taken the construction of Roth and Meadowdale together, it is conceivable that a site somewhere in between the two could have been utilized, and if this had been done, it seems to me the open invitation to whites for a white high school in Meadowdale would have been lessened considerably and it would have lessened the opportunity for movement of whites to that area in terms of schooling.
THE COURT: Mr. Lucas, may I interrupt for just a moment.
Dr. Foster, how do you view the responsibility of a school board when a real estate developer determines to build a large construction project of, let's say, 800 or 900 homes? Is it your opinion that the school board has an obligation to refrain from building schools there in order to discourage him because it may be totally a white development?
THE WITNESS: Well, I think at this time certainly it does, because I think the total problem that you are speaking of has certainly racial implications.
THE COURT: In other words, you are suggesting that a school board in effect has a veto power over private development of tracts?
THE WITNESS: Well, I am not exactly sure I would put it that way, but I certainly think they have a right to say where they are going to put schools, not only a right, but a duty.
THE COURT: They do not in your opinion to place the schools where there are such developments?
THE WITNESS: I think that's my opinion, yes.
THE COURT: Thank you.
THE WITNESS: If they can do it, other factors being equal, including the racial situation, why, who would argue, but there are other factors besides site convenience.
THE COURT: You may proceed, Mr. Lucas.

By Mr. Lucas.

Q. Dr. Foster, in your opinion, should a school board locate schools before development or for anticipated development when they have space available in other schools in the system to which the students could be assigned?

A. Well, again it is hard to answer that in the abstract, but other factors being equal, certainly I would use the schools that are available, and I think ones that do have capacity rather than new structures, and one of the difficulties with Meadowdale and Roth, it seems to me, is neither one of them have been filled to capacity for the past several years as I read the figures by quite a bit.

Q. In that context, Dr. Foster, building the schools where the children are and making schools convenient, are those terms in your experience and in your opinion subject to such other duties as the Board may have?

A. Yes, of course.

Q. And that would include whether or not they already had space and it was not being used; is that true?

A. That's correct. It seems to me there are two very important factors that are operative now and have been all along, and they are economy and what we do with our money in terms of school buildings because they are very expensive, and I think the other one obviously is the constitutional problem of desegregation.

• • •

Q. You said constitutional. Do you think segregation or desegregation of schools is also an educational responsibility of school boards?

A. Of course, I do.

Q. Now, Mr. Greer asked you about an optional attendance area in the cemetery. Dr. Foster, do you know where the information as to optional attendance areas came from?

A. I think I have said as far as I am concerned it came from two places. One is Plaintiffs' Exhibit 123 which was board minutes, and the other was from the maps which Mr. Lamson prepared.

FILED
MAR 3 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume II

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend,
Donna Brinkman, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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Petition For Certiorari Filed October 13, 1978
Certiorari Granted January 8, 1979

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V. TESTIMONY OF WILLIAM MARQUARDT.

[R. I. 1721-1722, Vol. 17]. Q. Would you state your name, please?

A. Willard Marquardt.

Q. And are you associated with the Dayton Board of Education?

A. Yes, sir.

Q. In what position, Mr. Marquardt?

A. Director of Athletics and Physical Education.

Q. How long have you held that position?

A. I think this is my fourteenth year.

Q. And just what does this position involve?

A Well, it involves a great deal of all the athletic scheduling and hiring of officials and trying to get sites to play ballgames and physical education and health and safety quite a lot.

Q. Are you involved in any type of city league that is in existence in the City of Dayton?

A. Yes. Our office makes all the league schedules for all sports.

Q. What teams comprise the City League?

A. We have eleven of them. Do you want me to name them?

Q. Are they the high schools in the City of Dayton?

A. Yes, they are all eleven high schools.

Q. Now, have you made a search of the minutes of the Athletic Board to determine when Dunbar became a member of the Dayton City League?

A. Yes, sir. Dunbar was a full member of the Dayton City League in 1948.

Q. And since you have been Athletic Director of the Dayton Board of Education, has Dunbar participated in the City League with all other high school teams in this league?

A. Yes, sir, they have.

• • •

[R. I. 1736, Vol. 17] Q. Do you get into the question of whether or not other teams – the question of whether or not there are other teams that the teams may schedule besides the City League games?

A. No, sir. Each school has a faculty manager of athletics and they are responsible for making up the complete schedule of non-league games. They can make them either at their school or away, whichever they desire.

Q. And in football and basketball there has been this innercity competition between all the eleven teams in the City League, is that correct?

A. Yes, sir.

• • •

W. TESTIMONY OF NELSON T. WHITEMAN.

[R. I. 1737, Vol. 17] Q. Would you state your name, please?

A. Nelson Whiteman.

Q. And are you presently associated with the Dayton Board of Education?

A. Yes, sir.

Q. And what position do you hold?

A. Principal of Patterson High School.

• • •

[R. I. 1739-1747, Vol. 17] Q. How many classes or grades were involved in this school at that time?

A. At that time, three years, three grade levels; tenth, eleventh, and twelfth.

Q. And how long was Patterson Cooperative a three-grade school?

A. Unitil 1968.

Q. And what three grades would that have been?

A. Ten, eleven, and twelve.

Q. Now, you indicated that it was a vocational type school?

A. Right.

Q. How were the students recruited for attendance – first of all, was this an all citywide school?

A. Yes, sir.

Q. How were the students selected or recruited during the period of time that you were there, from 1953 up until the spring of 1967?

A. We had a team of coordinators and counselors that visited the other high schools in the city and put on an assembly program for the ninth grade students in those schools to explain to them the opportunities that were available at Patterson Cooperative High School.

Q. And did you visit or did the teams visit all of the high schools?

A. Yes, sir.

Q. And were you a part of this team?

A. Yes, sir.

Q. What high schools did you visit?

A. Oh, I visited Fairview and Belmont, Wilbur Wright, Stivers, Roth, Roosevelt and Dunbar.

Q. Now, during the period of time that you were in the Patterson Cooperative High School, from 1953 through the time it became a four-year high school, were there any spaces available for any additional students in this school?

A. Yes, sir.

Q. Now, during this period of time, up until it became a four-year high school, were there any efforts made by the staff at Patterson to obtain more black students at Patterson?

A. Yes. In one incident I can recall particularly in February of 1965, we had a special luncheon for the principals and guidance counselors of the black schools in Dayton to try to enlist their help, to encourage more black students to attend Patterson.

Q. And this would have been when, in '65 did you say?

A. February of 1965.

Q. Now, Patterson became a four-year high school in 1968?

A. Right.

Q. At this time your recruiting would have taken place, I take it, in the spring of 1967, when applications would have been received?

A. No, your applications would have been received in the spring of 1968 for the fall of 1968.

Q. All right. Could you tell us what were the considerations tl at went into or how you decided to select the freshman students that were taken into the student body in the fall of 1968?

A. Well, I'm not sure I know exactly what you are asking me.

Q. All right. Let me restate the question.

A. Okay.

Q. Your procedure before was to visit the high schools.

A. Correct.

Q. Now, as I understand it – well, let's go back to 1968.

On the applications, what considerations – when you became a four-year high school, were there an increase in applications at that time?

A. Yes.

Q. What were the number of increases?

A. Well, when we were a three-year high school we never had as many as five hundred applications for any one year.

We were going to shoot for five hundred applicants at the freshman level, and the first year we had 1200 applicants.

Q. Now, how did you decide to select the students from the various schools when it became a four-year high school?

A. Well, when it became a four-year high school the selection of students then took place at the elementary level, at the completion of the elementary school, rather than at the freshman level of the high school, and we decided that the fair way to do it would be to give every school so many places of those students that were to be selected.

The first thing we did was to establish the total enrollment of eighth grade students that year, citywide, both public and private schools.

That was right in the neighborhood of 5,000 students. We were shooting for an enrollment of 500 that year. So we guaranteed every elementary school that we would take ten percent of their total eighth grade enrollment.

Q. And that was ten percent of each elementary school in the City of Dayton?

A. That's right.

Q. And did you do that for the start of the year for 1968-69?

A. Yes.

Q. Now, were there any other criteria or selection processes that were gone into rather than, I guess we call it, the ten percent?

A. No. Again, I'm not sure I understand your question.

Q. Of the students that applied, where did they apply for admission to the school?

A. Well, we had a printed application form that they could pick up either from their counselor or their principal, whichever it happened to be, and they could return the application blank completed and signed by their parent to their counselor or principal, and then we made a return visit to the school for an interview with each student.

Q. Now, at any time after it became a four-year high school, was the policy for selecting students changed?

A. Yes.

Q. And would there have been a change in the year 1970-71?

A. 1970-71?

Yes, we went to a selection criteria that Dr. Durant, along with Dr. Goff, helped us to work out to make the selection more objective.

Q. And could you explain that?

A. Well, I don't know what you mean.

Q. What do you mean by being more objective?

A. Well, it was felt that the counselors of our school had too much authority in the selection of students previous to

that, and that the selection should be more objective than subjective.

Q. And was there any change then in the policy of selection in the year prior to 1971-72, the registration period?

A. Yes.

Q. What was that change?

A. That year, which would be the present freshman class, the students were selected by lottery.

Q. And was there any basis or change in that at that time?

A. No.

Q. Were there any criteria established for percentages on ratio on black or white or female or male?

A. Yes. Again, the first thing established is the total number of eighth graders in the city, and then the percentage of black students citywide, so the percentage of black students citywide is the same as the percentage of black students except in our freshman class.

Q. And that became effective what year?

A. This year, this school year.

CROSS-EXAMINATION

BY MR. LUCAS:

Q. Let's, if we can, put the policy in reverse order.

You said in 1971-72 students were selected by lottery?

A. That's right.

Q. Now, does the 10 percent rule still apply?

A. Yes, sir.

Q. So you get your pool. Is it from all of the elementary schools you take? You see how many eighth graders you have?

A. Right.

Q. And 10 percent from every school are eligible to go into the pool, is that right?

A. Well, it's not 10 percent every year. The percentage depends on the total enrollment of eighth grade students citywide.

The percentage may vary from one year to the other.

Q. Okay. When was the 10 percent rule instituted? Was that 1968?

A. That was the first year we were shooting for 10 percent.

Q. Okay. That 10 percent has been dropped, is that correct?

A. Well, the percentage varies from year to year, depending on the total enrollment.

Q. So there is no flat 10 percent rate?

A. That's right. The flat figure is 500 freshmen each year.

Q. Now, before 1968 how did a child get into the school, before you had the freshman class?

A. Okay. A freshman in another high school would make application directly to the vocational division he wanted to enroll in.

Q. The vocational division at Patterson, is that right?

A. Right.

Q. He would not go through his counsellor and be in turn recommended to you?

A. No. We visited the schools, and as we visited we visited the high schools, and put the presentation on for the freshman class, and as we visited they could pick up application blanks and other literature from us, but then they returned them directly to us.

• • •

[R. I. 1748-1764, Vol. 17] Q. All right. And then the counsellors made the decision as to how many students would get in. And how many would you take in an average class before 1968?

A. Well, before 1968 we would take most anyone that applied, providing he was passing and had a good attendance record.

Q. Okay. Before that time, since 1914, really, when it was founded, Patterson had operated below capacity, is that correct?

A. That's right.

Q. In 1968 – I'm sorry. Let's go back.

Were you there in 1953?

A. I came there in the fall of 1953.

Q. All right. Was there any black teachers at Patterson at that time?

A. No, sir.

Q. Were there any black counsellors?

A. No, sir.

Q. And the admission process was through black counsellors, is that – I'm sorry. Through the counselling department in each division?

A. Yes.

Q. All right. And how long a period was it before you had any black teachers at Patterson?

A. I can't answer that exactly. In the early '60's we had one black teacher in the medical arts department, but I can't –

Q. I'm sorry? What department?

A. Medical arts, but I can't tell you the years.

Q. All right. When did you get your first black counsellor?

A. '68 or '69.

Q. So until that time the primary admitting unit, or until 1968 at least, the admission process was through the counsellor, and you had no black counsellors, is that correct?

A. That's correct.

Q. By 1969 how many black teachers did you have?

A. 1968?

Q. Yes.

A. I don't know that we had any. I can't say for sure but I don't know that we had any in 1968.

Q. Was it the '69-70 school year that you got your first black counsellor?

A. I would guess the '69-70 school year, yes.

Q. Right. Now, was it the '68-69 school year that you had the policy change about the 10 percent?

A. No. The '68-69 school year was the first year for the freshman class.

Q. All right.

A. And the 10 percent was established for the first year because the total enrollment city-wide was 5,000, and we were shooting for a mark of 500 freshmen.

Q. So you took the 10 percent for each school for the '68-69 school year?

A. Right.

Q. That's what I want to understand.

Now, what was the admission process, the '68-69 school year? If you can just sort of trace for me, what the average child who was interested in Patterson, what process would he follow to get in?

A. Okay. In the '68-69 year we visited the elementary schools and we put on a program that was very similar to the one we put on in the high schools, to present to the students the opportunities that were available to them at Patterson Co-op.

Q. Was this an all white presentation team?

A. In '68-69, probably.

Q. Go on.

A. We left then application blanks in the elementary schools for the students to pick them up from either their counsellor or their principal. In some schools they didn't have counsellors at the elementary level, so they had to pick them up from the principal's office.

They had to take them home, have them completed, and signed by the parents, and returned to the counsellor in their elementary school.

We then went back and interviewed those students and made our selection from those that applied.

Q. Now, when you say we, do you mean the team or the usual counsellors from each department?

A. A team of counsellors.

Q. I see. And do you generally draw your team, one from each department in the school?

A. We did, yes, the first year, and we did when we were visiting high schools.

Q. So essentially it was still the same initial process through

the counsellors, except the source of applications was more organized?

A. Right.

Q. Is that a fair statement?

A. Yes.

Q. All right. Assuming you had 10 percent from each school – I am not sure yet I understand how it works. Can we do it with numbers?

A. Yes.

Q. Give me an example of a school you had a freshman class to fill.

A. Let's say Westwood School had 100 eighth graders. We were going to take 10 from Westwood School. Now, they may only have 10 apply, but we will take those 10. If they had 40 apply, we would take 10 from the 40, but if they have 100, we still will take 10.

Q. Using the 10 percent figure, that would be sufficient to give you a full freshman class?

THE COURT: Let me ask one question, if I may. You indicated you conducted a lottery. Is it a lottery at each school that has in excess of the percentage number?

THE WITNESS: I am not sure I understand your question.

THE COURT: All right. Let's assume this example; You have 100 eighth graders and you are going to take 10. Forty apply. Do you conduct a lottery among those 40?

THE WITNESS: Yes.

• • •

Q. The lottery was not in effect in 1968-69?

A. No. The lottery was only in effect for the present school year.

Q. I think you have got me cleared up on 1968-69. How many new students did you take in?

A. Five-hundred.

Q. Is that all freshmen that year?

A. No. Well, the 500 was freshmen. I didn't answer your question correctly, and I am sorry. The 1968-69 school year,

we had to take two classes, a freshman and a sophomore class. We took 500 freshmen or approximately 500 freshmen.

Q. Now, before you added the freshman class to the school, am I correct that you started with sophomores and they stayed in the school full time and took the regular curriculum and at the 11th and 12th grades they worked two weeks and had two weeks of study?

A. That's right.

Q. So, their first year coming into the school was a question of getting them a job. They had a regular curriculum in the school unit; is that correct?

A. That's right.

Q. And that continues today even though you have four grades, freshmen and sophomore students have their schooling in the self-contained school unit and in the 11th and 12th grades they do the two weeks of work and two weeks of schooling?

A. That's right.

Q. Are there any students in the 11th and 12th grades who do not do the two weeks on and two weeks off and take just only school courses?

A. From time to time there are, yes.

Q. I mean, is a student absolutely required to do the work part of the program under the four years school that you now have?

A. Yes, that is part of his program.

Q. What if you can't get him a job? I don't want to use kicked out, but is he sent back to another school?

A. No, not always. We keep them. Sometimes they are, sometimes they aren't, depending on the student and the circumstances, but normally a student that is doing well in school and has the job potential, we will keep him until we find him a job.

Q. And if you are unable to find him a job because of the depressed labor market or what have you, would you just keep him on through graduation?

A. Yes.

Q. And he gets the same kind of degree the other students do?

A. Yes.

Q. Now, you said that in 1970-71 there was another policy changing that that Dr. Durant and Dr. Goff had worked out, some policy criteria for acceptance of children?

A. Yes.

Q. What was the reason for adoption of this policy?

A. Well, there has always been in some of the other schools the feeling that the counsellors from our school or the co-ordinators from our school had been too subjective in their selection and not objective enough in the criteria selection rating scale that they devised which was an attempt to become more objective rather than as subjective as it had been.

Q. You say this has always been a problem?

A. As long as I have been there.

Q. Is this something that came about in 1968-69? You have had a problem before?

A. No, we have always had the problem.

Q. As I understood it, you took in anyone who was in good standing before that because you had plenty of excess space?

A. That's right, but the criticism was there in spite of it.

Q. I am sorry?

A. The criticism was there in spite of it.

Q. Even though you took everybody who applied and was in good standing?

A. That's right.

Q. You didn't reject anyone?

A. Only those that were failing or had poor attendance records.

Q. In 1970-71, was there any particular acceleration of this criticism as a result of the adding of the freshman class?

A. Yes.

Q. Was that the first time you actually limited enrollment at Patterson?

A. No, no. The limited enrollment was in 1968-69.

Q. And therefore, in 1970-71, you had this criticism and you attempted to deal with it by setting up these criteria?

A. That's correct.

Q. And I take it that didn't satisfy the criticisms.

A. That's right.

Q. So, you adopted what you call a lottery method in 1971-72 where you take the percentage city-wide depending on you needs in terms of an entrance class which is 500?

A. Right.

Q. You take the same percentage from each school?

A. The same percentage from each school.

Q. Is it the percentage of the 500 that you divide up among all the schools or do you take a percentage of the – suppose School A has 500 people who want to go to Patterson whereas School B only has 2. Do they still get the same 8 percent or 7 percent quota?

A. Yes.

Q. So that a child going to one school where there are more children applying for Patterson may be excluded from Patterson because his school's quota is filled; is that right?

A. Would you state the question again?

Q. Okay. Let's take Jackson Elementary. Suppose under the quota you can take 10 children.

A. Okay.

Q. You can take 10 children from Jackson and you have 40 who want to go.

A. Okay.

Q. Obviously there are 30 children who don't get to go to Patterson.

A. Right.

Q. Whereas Shoup Mill might have 2 children who want to go to Patterson and have a quota which would permit 5 or 6 more children to go. Is there any provision for filling the vacancy by letting some of those other children from Jackson who wanted to go take up that gap in the quota?

A. Yes.

Q. How do you work that?

A. Once a quota for each school has been established and selected, then those schools who have not met their quota, all the students that have not been selected go into a city-wide pool and then they are selected from that.

Q. And how do you get your racial quota now?

A. How do we get it now?

Q. Well, you told us how you figured it. You took all eighth graders in the city and then you took or you figured out what percentage black that was and that was the percentage you tried to have in your annual class; am I right?

A. Right.

Q. And all I am asking is how do you go about doing that? Does it automatically happen that you get that percentage black or do you have to use some other techniques to achieve the percentage of blacks that there are in the eighth grade system?

A. You have confused me with your question.

Q. Let me go back. It is my fault, I am sure.

Let's assume that your percentage of black children in the eighth grade is such that you require 200 black children in the entering freshman class.

A. Yes.

Q. Suppose under the formula, the way it works on a lottery, you only get 150. How do you go about getting the other 50?

A. Well, the city-wide pool is divided into boys, girls, black and white, and they will select them out of the city-wide pool.

Q. And you don't use a lottery on that pool?

A. Yes.

Q. Well, how do you make sure you get the extra 50 black children in my example?

A. Well, we ask the computer service to draw us the extra fifty blacks out of the city-wide pool, be they boys or girls.

Q. If there are 500 blacks in the pool, then you take 50 by lottery from the black pool; is that right?

A. Yes.

Q. What is the purpose of setting up these criteria?

A. You mean the percentage of black and white?

Q. Yes. What is the purpose for doing that?

A. It goes back to our original purpose, I think, of trying to get as good a cross section from the entire city as we can possibly get.

Q. You say your original purpose. How far back does that go?

A. In 1968 when we became a four-year high school. That is the way we set it up then.

Q. In order to get a cross section from the city as a whole, you have to look at factors such as race and sex and things of this sort; is that correct?

A. Yes, sir.

Q. And that's the technique that the school system itself has devised for doing?

A. Yes.

Q. How many black children were in Patterson in 1968?

A. In 1968?

Q. Yes.

A. I do not know.

Q. Approximately?

A. Are you talking about percentage-wise or numbers?

Q. Either way.

A. I can't answer that.

• • •

A. If I read this correctly, in 1968, 18.3 percent. Am I right?

Q. Right. What about the other years? Do you have that on the exhibit?

A. 1969, 22.2 percent; 1970, 29.8 percent; 1971, 31 percent; and 1972, 32.9 percent.

Q. How about 1963, do you have that figure on there?

A. 1963, yes. That is 1.8 percent.

Q. How do you account for the small number of black students in Patterson in those years?

A. What year are you talking about?
Q. 1963 and 1966.
A. I am not certain I can account for that period. We visited the black high schools the same as we visited all other high schools. I know that black students were reluctant to come to Patterson High School much moreso than students from other high schools, and I don't know the reason for that.
Q. Were they discouraged from coming in any way?
A. Not to my knowledge.
Q. Were they not told of the difficulty getting them jobs because of the discrimination in the job market?
A. Were they told that?
Q. Yes.
A. We certainly didn't tell them that.
Q. The counselors didn't tell them that?
A. No, sir.
Q. How do you know that? Were you present when counselors met with the students?
A. I was on the counseling teams that visited.
Q. Would you agree with Superintendent French when he said that that was the reason why blacks were not taken into Patterson, because you couldn't place them in jobs?
A. That may have been one of the reasons, but we certainly didn't tell students that, and we never discussed that in any kind of a staff meeting in our building.
Q. Was it a problem that you had?
A. I don't know that it was a problem because we never had enough black students in those days to test it.
Q. Do you recall in 1958 at the time that the policy was announced the policy changed adding of the extra grade at Patterson making a statement that you were still working on this area of job discrimination by employers and there is still some areas where there are problems but it is being eliminated?
A. Yes, I can remember that.
Q. Do you remember making that statement?
A. I don't remember making the statement, no, but I can remember us working on that problem because there was

some job discrimination, but we never had an opportunity to test it to any extent.
MR. LUCAS: Your Honor, I have a clipping I would like to exhibit to the witness and see if it refreshes his recollection.
Q. Does that refresh your memory of that meeting?
A. No.

• • •

X. TESTIMONY OF WALTER M. BAGWELL.

[R. I. 1780-1782, Vol. 18] Q. Would you state your name, please?
A. Walter M. Bagwell.
Q. And where do you live, Mr. Bagwell?
A. 5531 Wolfe Road, Dayton, Ohio.
Q. And are you presently employed?
A. Yes, I am.
Q. And where are you employed?
A. At the Sinclair Community College, Director of Physical Plans.
Q. And basically what do you do at Sinclair?
A. Responsible to the Board and coordinator between the architects and the contractor for the construction of the college.
Q. And what is Sinclair?
A. It is a junior college.
Q. Is this a new building that was constructed?
A. It's a new building.
Q. And before your position with Sinclair College, where else were you employed?
A. I was employed by the Dayton Board of Education.
Q. And in what capacity were you employed by the Dayton Board?
A. As Assistant Superintendent in charge of business.
THE COURT: In charge of what?
THE WITNESS: Business.

• • •

Q. And how long did you hold that position?

A. I was acting superintendent from June until November, 1953, as an appointee to the job in November of 1953 until June of 1969.

Q. And is that your first association with the Dayton Board of Education, June of '53?

A. No. I came with the Board in June or July of '52 as assistant to Mr. Carlson who was the Business Manager.

Q. You were assistant, then, and took over as Business Manager the following year?

A. Right.

Q. And as Business Manager, what were your duties or what did your job involve?

A. Primarily I was responsible for the operation and maintence of the existing plant which included the cafeterias maintenance and operation, for the planning and recommendation of architects in the construction of new buildings.

• • •

[R. I. 1783-1784, Vol. 18] Q. Could you tell us during the period of time that you were with the Board what criteria you used for site selection of new buildings?

A. Well, primarily the site selections were in the area where the children were and, of course, along with that was the economics of it. The schools work closely with the city in locating their schools adjacent to playgrounds if they happen to be in the same area where the students were located or lived.

Q. Were there any other factors that you took into consideration?

A. Yes. All of the schools had to be within walking distance which the Board had set up from their homes to the school site, and this was normally the case. Transportation was not provided for them unless it happened to be a hazardous situation for them such as highways that had no sidewalks or railroads that had to be crossed.

Q. Now, you indicated that you were building the buildings where the children were. Did you take into consideration where they may be?

A. Yes. We bought a couple of sites on the basis of anticipated enrollments on the basis of plans that had been submitted to the City Planning Board, and we bought sites for those locations with the intent that if the development went ahead, we would build schools there.

Q. How did you determine where the children were going to be or may be?

A. From the plans and plats that were submitted to the Planning Board, we received a copy of those for review to get an idea of the layouts to see that there was adequate walkways that would permit access from the plats by streets or by dedicated easements that would lead to the schools.

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[R. I. 1788, Vol. 18] Q. And where is Carlson located again?

A. Carlson is on the southern end of Gettysburg and Germantown. It would be the west and north corner.

Q. And what were the considerations that went into locating that school there?

A. Well, it was the site size. It was economic. So we had students who were across the street from Gettysburg, across the street from Carlson. We had quite a development going in the rear of Carlson School that abutted it. There was a possibility that the Veterans Administration would dispose of quite a bit of their land that was going into housing projects, and at one time plans were set up, but they did not crystallize. Part of the land was bought off or given to the University of Dayton for their west campus. But quite a bit of it did go into development.

Q. And does the University of Dayton still own that land?

A. They still own that land. They have some 75 acres there, I believe.

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[R. I. 1790-1797, Vol. 18] Q. The next school that we have is Gardendale, and that is located where?

A. That's Gardendale, and that –

Q. If you could, general locations, locating it for the record, please?

A. It is west. On Western Avenue and Gettysburg. The west side of Gettysburg and what would be the extension of Western Avenue. Western Avenue wasn't extended at that time.

Q. And could you tell us what considerations went into locating that school there?

A. Gardendale, one of the main considerations at the time of building Gardendale was the school wanted to develop a program to house all of its mentally retarded students who were at that time being housed in Orville Wright, which was on the opposite side of the city, and since all of those students were transported to the site, it didn't matter too much the location of the school, since we transported them from all parts of the county, or of the city district, and a number of them came from out of the district. But the school was primarily developed for the mentally retarded, and then there was part of the Townview area in the back that was developing, and so additional rooms were added to that school in order to make it some 20 to 23 rooms, I believe.

Q. Was there ever any consideration or any fact given to the possible annexation of the school district into the Townview area?

A. At one time there was a discussion of Townview coming into the school district.

Q. Townview would be where, what part?

A. Right at that location.

Q. Around here?

A. That's right.

Q. Which would be on the west of Gardendale?

A. Yes. It adjoins the Gardendale School, abuts up against the school district.

Q. How many rooms were constructed for the mentally retarded?

A. I believe there were eight rooms which were self-contained, that is, had their own toilet facilities, storage and everything else, plus they had utilization of the gymnasium facilities and the other special items, such as industrial arts, home ec areas.

Q. Do you know why you had to place those children in a school in the Dayton System?

A. I'm not sure. They had been with the school system for quite some time. The Board had taken on that responsibility. It may have been mandated by the State law, that we maintain and take care of them.

Q. The next school that we have then is Hickorydale, and that was built when?

A. Hickorydale was built in 1957, and that is south of the Belle Haven area.

Q. And again to what part of the city?

A. That's in the western part of the city. The northwest part. It is between the Gettysburg and the Belle Haven area. That school was also built adjacent to some 40 acres of city park, and we have some 10 or 11 acres there that we developed.

Q. And did you give us the year that that was –

A. 1957, I believe it was.

Q. That was the date of construction?

A. Yes.

Q. And what other factors went into consideration of locating Hickorydale?

A. Well, the fact that students were there to relieve Belle Haven. That was primarily it. That and the fact that it was adjacent to the city location, but that area was developing all the way to the north and south of it, all the way up to the Hillcrest area and then going south toward what would be England, Queens Avenue and those streets that were developed.

Q. The next school that we have is Jackson Primary, and when was that built?

A. Jackson Primary was built in 1960.
Q. And that was –
A. On the same site as the Jackson Elementary.
Q. And Jackson is located where?
A. It's in the west side of the city, southwest part.
Q. And why was it located where it was, on that site?
A. Well, all of our primary schools are on the same site as the original building, the elementary part, and it would have been a matter of having to go out and pick another site that was out of the district, or not as centrally located. Many of the students, in the primary schools, they were brought to school by their older brothers and sisters who walked them to school, and so this would have been another problem of placing them in a different location. It was just an ideal location to put it in.
Q. Was this located because of the students' need there again?
A. Yes. It shortened up the playground, which we were limited in, because of the street locations and the industrial site to the west and the railroad to the north, but we had made an attempt earlier to try to save the play area by putting it down in a certain corner of the site, but the long-range plans of the city is to have Route 35 come through there, and so we had to move it at the insistence of the city.
Q. That would be the extension of Route 35, and it is now a four-lane highway on the eastern side of the city?
A. Right. It stopped at the river, or just beyond the river.
Q. And that is stopped as of now where? Where is it stopped?
A. Well, it stops just beyond the interchange of 75 and 35.
Q. In other words, somewhere right around here?
A. Right in that location.
Q. In this location?
A. Right.
Q. And there was plans for extending 35 westward?
A. That's right. And it would come through down Home

Avenue and that area, so it was the city's plan at that time that the possibility that the school would be in the wrong location, and they wanted us to move it, so they asked that we move it. So we redesigned it and relocated it.
Q. The next school that we have is Jefferson, Jefferson Primary.
That was constructed when?
A. Jefferson Primary was constructed in 1967. That's on the same site – it's in the Daytonview area and it –
Q. You will have to find exactly which part of the Daytonview area we are talking about.
A. The northwest area of the city. The immediate northwest, if you want to call it that. Just north of Wolfe Creek, which you have your pointer on there, and it would be Broadway – not Broadway – I'm not sure what would be the right description of it.
Q. This was located where the elementary school was?
A. That's right. Located where the Jefferson Elementary school is, which was built in 1915 or 1916.
Q. What year did you say this was constructed?
A. 1967.
Q. Now, what considerations went into locating this school there?
A. There was quite a bit of discussion held with the city about the possibility of acquiring land at the lower part of Jefferson District.
Q. Excuse me. Where would that have been?
A. That would have been south of the Jefferson School site, down here near what would be the Ferguson-Broadway area.
Q. South of the –
A. District.
Q. South of the present location?
A. Of the present location. It would be Oxford – some five or six blocks south of it.
But the purpose of that was to – there was great need for recreational area in that district because of the fast increase

in the number of students, and so the city had in their long-range plans to acquire land, some eight to ten acres, near Broadway and Riverview and the Ferguson area, and we talked to them about the possibility of moving up their timetable and acquiring land that we could have built a school on with them, and we would acquire land along with their 10 acres, and we would have a decent site and a decent play area, because the present Jefferson site is kind of limited in area.

Q. We are still talking about this proposed area?

A. We wanted to build that school there, but there was quite a bit of public discussion about it and the feeling was that if we built the school there that since the trend of the black movement was north, that we would take a great number of the blacks out of the Jefferson District and would whiten up the Jefferson Elementary School. So this wouldn't be the thing to do, so the final decision was to put the whole school on the same site rather than put the primary school at the lower level.

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Q. Then this site was located at the present elementary site?

A. Right. On the present elementary site. We acquired some additional land there to try to relieve the loss of play area, but that had been a slow process because they are large homes and the development would have been extensive.

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[R. I. 1812-1814, Vol. 18] Let's get back to the schools. The next school we have is Dunbar, and that was built when?

A. That was built in 1962, and that is on Rich Avenue down here in the Miami Chapel area.

Q. And why was that built?

A. That was to relieve the Roosevelt area school, and there was certainly in the early considerations of that school some discussion to hold it or to build it along the Germantown area and to eliminate a lot of the substandard housing in that

area to try to put together a site of some 25 or 35 acres there, but the cost involved and the time that would have been spent in running down the absentee owners and vacating the streets and what have you, to get a decent size would have been prohibitive in cost, and then it came to our attention the land of Dr. Washington who had the acreage not too far south of it which we got 52 acres for quite considerably less and which had all of the facilities except for the streets already available; that is, sewer and water.

Q. The next school that we have is Meadowdale which is located up on the same side as Meadowdale Elementary and that was built when?

A. That was built in 1960.

Q. And what considerations went into locating that school?

A. Well, we acquired that land also along with the site to build the elementary and the area was developing. I forgot the name of the construction people, but we kept in close touch with them and we stated the areas that we wanted to use eventually for a high school and we acquired that. As a matter of fact, I think the developer had given the city something like three acres of ground and we used a park in that area which the city threw in to the School Board to be used as part of the site. That is our Fairview High School.

Q. Now, the next one we have is Patterson, and that's a co-operative school and that is located where?

A. That is in Downtown Dayton.

Q. That was built when?

A. 1952. That's the co-op school.

Q. And where is that located did you say?

A. That is at First and Sinclair.

Q. And why was that located in that particular area?

A. That is where the old Patterson Parker High School was built and it was expanded and we bought land adjacent to it. Eventually we bought the whole block and expanded the high school. The vocational school serves all of the districts.

Q. And finally the last one is Roth High School which is out on the far, far west side.

A. That was built in 1959.

Q. What considerations went into that?

A. That was also a relief of high school students and to serve them in that area. We at one time discussed building the school on Third Street as a means of trying to get it closer to transportation, but difficulties developed and we found that land could be obtained in greater quantity and much less price at Hoover Avenue and Elmhurst or the Elmhurst extension, so we bought 30-some acres at that point and built the school there.

Q. Now, there have been additions onto the existing buildings, have there not?

A. Right.

Q. What considerations went into determining what additions should be placed on buildings?

A. Well, most of the additions were to serve the youngsters in their school district, and if the district increased in size, then we just added the additions to the school and we tried quite often to acquire additional ground to increase a site if it were possible, but if we were to try to build in a square, we would get into the problem of having a smaller school size perhaps since the additions in themselves wouldn't be worth putting a new school up • • •

[R. I. 1816, Vol. 18] Q. Mr. Bagwell, you came to the system in 1952?

A. Right.

Q. Did you teach or do anything else in the school system prior to this time?

A. I acted as Superintendent in charge of the building inspector for the City of Dayton prior to that.

Q. Are you familiar with the standards for minimum site size recommended by the State for elementary schools?

A. I know what the minimums were. They used to say five acres to start with and one acre for every hundred students.

Q. There is a formula?

A. Yes.

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[R. I. 1818-1819, Vol. 18] Q. Are you also familiar with the recommendations for minimum sizes and maximum sizes of schools; for example, that an elementary school should have a minimum of so many students and should generally be kept below a certain number of students?

A. There are recommendations on that. There are personal feelings about what makes a large school or small school or good school or bad school.

Q. What are the recommendations for minimum size for an elementary school unit?

A. I am not sure I could give you what the educators say on it. I would say 500 to 600 is a good school for the elementary level. In a high school, I would probably want to stay with 1500 to 1800 at the most if it were possible to do that. Sometimes it is not economically possible.

Q. But you wouldn't go below five or six hundred for elementary. How high would you go for elementary?

A. If I had my druthers, I would probably like to say five or six hundred. With hindsight, I would say —

Q. Well, have you ever dealt with a problem where you recommended it not to to the size that it eventually went to in a particular school?

A. I didn't have too much to do with the sizes that the school went to. The recommendations sometimes were compromised on the matter of money available for building and the finances available for salaries and what have you because larger schools mean that you have less staff. It means that you probably will end up sometimes with more classes that are uniform in size throughout rather than having smidgens of classes or small size classes, and this is pretty expensive because the greatest cost in your school setup is your teaching, and just one pupil more or less you have heard in the Dayton System is worth a million dollars just to take one out of every classroom a year and train them.

Q. Did you make recommendations in connection with the cost of maintenance when the schools got over certain sizes?

A. Yes. I made recommendations, but it was known from information that in the larger schools – well, in fact, in all cases, the larger the school, usually you had a greater percentage of vandalism at it.

Q. Did you not in fact recommend against the location of certain schools and placing of units in particular places because you know what would happen in terms of enrollment and impaction in that area?

A. I think the one that I readily recall I was against the location of was the Jefferson Primary School.

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[R. I. 1824-1826, Vol. 18] Q. As a preliminary question, were you around when the schools were opened and did you see to it that everything was ready to start operation?

A. Right.

Q. Did you attend the dedication ceremonies?

A. Not when I could get out of them?

Q. But you were familiar and checked with the school when it was in operation to make sure it was within the warranties?

A. Right.

Q. Directing your attention now to the Belle Haven School which was in the northwest area –

A. Right.

Q. – are you aware that that school opened with a 100 percent white faculty?

A. Right, although I would assume it would be because it was in that neighborhood at that time.

Q. Now, the Carlson School, that opened with a 100 percent black faculty, did it not?

A. Well, if it didn't, it was close to it.

Q. Eastmont, did it open with a 100 percent white faculty?

A. Right.

Q. Fairport, did it open with a 100 percent black faculty?

A. No, white.

Q. I am sorry, 100 percent white faculty, and that's the one that you say a developer offered the School Board space, the free land if they would build a school in that area; correct?

A. He offered the land that they could build a school on it if it would fit the needs of the school area; that is, if it was located in the site that would be adjacent to the youngsters.

Q. Mr. Bagwell, are you familiar with the advertising for new subdivisions where they say new school to be built in this area and new church, new shopping center?

A. Yes.

Q. The developer in this case gave you how many acres?

A. Twelve acres, I believe.

Q. And when that school opened, it was a white school or black school?

A. White school.

Q. And white faculty?

A. White faculty.

THE COURT: Mr. Lucas, I will permit you to pursue this, it is cross-examination. I would observe that this issue has been really well-developed in this case. I am completely familiar with the position that the plaintiffs have taken, and you have well-documented it. I think there is no question that there were schools staffed by white faculties and schools staffed by black faculties, but it is also my understanding and it has been well documented that at a point in time this was specifically changed. Now, referring to my original statement, I will permit you to go forward. I really don't see the pertinence at this point in the case of spending time on that issue.

MR.LUCAS: Your Honor, as understand, the evidence was presented that the schools were built where children were and we understand arguments flow from that and we are trying to show the school was identified wherever it was built by its faculty.

THE COURT: All right.

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[R. I. 1828-1829, Vol. 18] Q. The Hickorydale, where is that located? Is that to the west?

A. That's in the west and northwest areas, just south of Belle Haven School District. It is along the Wolfe Creek side.

Q. How large a school is that?

A. I don't know what it is at this point. It was at one time something like 30 or 35 classrooms, so it could have been seven or eight or nine-hundred.

Q. In 1972 enrollment indicates that there are only 475 pupils in that school. Was there a fire or anything else that happened to the building?

A. No. One of the things that might have affected the enrollment in many of these schools is the fact that they are getting into programs that will take more of the space for any number of things. It could have been reduced classroom size. When I started with the system there was 35 in the classroom. That's the average. And over the years they reduced it down to something less than 30, 28, 27, in that area, which would affect the kind of enrollment you have also.

But they have also several programs housing some of the school areas. Part of the area may have been taken up by development of the cafeterias, which until after I left the school system, we did not have cafeterias except in the high schools and in the special schools.

Q. Do you know whether any of that took place in Hickorydale?

A. I couldn't tell you that.

Q. You don't know?

A. No. I know a cafeteria took part of it, but that may have been just the gymnasium and some other areas.

Q. Were there 35 classrooms there?

A. I don't know that.

Hickorydale?

Q. Yes.

A. It says 14 – no.

Q. Pardon?

A. Fourteen classroom, and then eight, so it's 22.

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[R. I. 1848, Vol. 18] A. Right.

Q. And so instead you built additions in a particular area and you avoided the problem of boundary adjustment.

A. Right.

Q. Would you agree that in effect then, when you add – put an addition to a school, that as far as that space is concerned, you determine the boundaries and they are coextensive with the original boundaries of the school? Is that a fair statement?

A. I would say so.

Q. Pardon?

A. Yes.

Q. All right. So that if a school is already 100 percent black and you are making an addition to that school, you in effect have determined the boundaries to be that creating a hundred percent black school unit?

A. That's right, in most cases it was.

Q. All right. And for those primaries that opened a hundred percent black or white, the same would be true, although we call those new schools?

A. Right.

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[R. I. 1860-1862, Vol. 18] A. Right. I would assume anything I would say on the percentages of the faculty would be – I would tend to agree with you because I don't know that.

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THE WITNESS: For being in the area it was and the policy the Board followed, I would assume there would be a black student body and black staff.

Q. Did the Roth and Meadowdale planning go on at approximately the same time? Meadowdale was opened when?

A. About 10 or 12 years ago. Let's see, Meadowdale here is listed as 1960.

Q. And Roth was opened when?

A. In 1959, the year before, so construction would have been underway and Meadowdale and Roth and Dunbar probably would all have some construction or planning going on at the same time.

Q. And Belmont was what year?

A. 1952-53, that year.

Q. Was there an addition to Belmont High School?

A. Yes, there was.

Q. What year?

A. Probably 1966, somewhere in there.

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Q. Would you hand the witness Exhibit C?

Q. Would you look under the school Shoup Mill, please?

A. All right.

Q. And for the year 1968-69, how many students were enrolled at that school?

A. 365.

Q. And under Valerie for the year 1969-70, how many were enrolled in that school?

A. 1969-70, 486.

Q. Then, going to one other question that was asked you on this transportation across the railroad tracks, you indicated that that was a matter of no access there.

A. That's right. I believe that I can readily recall it was a Grant School District in which there were students east of the railroad and the Board used to transport them back and forth, but when the access was developed across there, that transportation was eliminated.

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Y. TESTIMONY OF RALPH CURK.

[R. I. 1864-1879, Vol. 18] Q. Could you give us your name, sir?

A. Ralph Curk.

Q. Where do you live?

A. 7210 Noretta Court.

Q. What is your present occupation, Mr. Curk?

A. Retired.

Q. And from what are you retired?

A. Director of Research of the Dayton Board of Education.

Q. Can you give us the history of your association with the Dayton School System as a student teacher or member of the Administration?

A. Well, it started as kindergarten student at Edison School through seventh grade at Edison, grade 8 at Weaver, grade 9 at Parker, graduated from Stivers High School, got my Bachelor of Science Degree at Indiana Central University and came back to Dayton as a teacher in 1928. I was a teacher at Clearview for three years and went to Roosevelt for three years, was Director of Research for 18 years, and retired in June, 1968.

Q. What subject matter did you teach at Roosevelt, Mr. Curk?

A. General science and chemistry.

Q. Were you involved in any administrative duties in addition to your teaching duties there?

A. Well, I wouldn't consider them administrative. I was a student counselor.

Q. When did you leave Roosevelt and go to the Central Office as Director of Research?

A. 1950.

Q. And when did you retire from that position?

A. 1968.

Q. Can you tell us what your duties were as Director of Research for the Dayton School System?

A. Well, primarily it had to do with the budget, estimating

the tax duplicate and the financial revenues, projecting the expenditures over a period of years anticipating the size of operating levies that the School Board might have to ask the voters to supply, the analysis of the census, projecting school enrollments, projecting the need for a staff and, well, I suppose anything financial eventually found its way over my desk whether I was directly involved in it or indirectly involved in it.

Q. What individuals and positions comprised the Executive Staff of the Dayton School Administration during this 18-year period that you were associated with them?

A. We were very fortunate in our Superintendent as being a true executive, and he would have staff meetings consisting of the three Assistant Superintendents, the Director of Pupil Personnel, the Clerk Treasurer, and myself on the staff.

Q. Can you identify the individuals that filled the staff positions during that 18-year period?

A. The Assistant Superintendent in charge of curriculum was Dr. Howard Boda, the Assistant Superintendent in charge of Staff Personnel was Homer Royer, and when I first went down, the Assistant Superintendent in charge of Business was Frank Carlson and replaced by Mason Bagwell, and the Director of Pupil Personnel was Harold Armstrong who later retired and was replaced by Mr. Goff.

Q. When did Mr. Goff assume that position?

A. I think it was in 1964.

Q. Does that cover the group?

A. And did I mention the Clerk Treasurer? He always sat in on the staff meeting.

Q. Who was the Superintendent of the System during this period?

A. Mr. Robert French.

Q. Is he associated with the School System at the present time?

A. He is a member of the Board of Education?

Q. As part of your administrative duties during this 18-year period, were you consulted with respect to the drawing of attendance and optional zones, Mr. Curk?

A. Quite often Mr. Armstrong would have a problem, and since I was involved in anticipating enrollments in various areas, he would come up and consult with me. We would go out and drive the area, examine it for hazards, accessibility, distance, and get a feel for the problems as presented to him at that time. Then, he would from that observation and discussion between he and I come up with a recommendation to the staff, and then in staff meeting we would have a chance to tear it apart and cuss and discuss it and then Mr. French along with Mr. Armstrong would have the recommendation for the Board.

Q. Did your same practice continue after Mr. Armstrong was replaced by Dr. Goff in 1964?

A. Not to the same extent, but the inter-offce communication of these problems and their recommendation, I was always notified of that.

Q. Were you retained by the Dayton Board of Education in connection with this lawsuit, Mr. Curk?

A. Yes, sir.

Q. And what have you done in connection with this case?

A. Well, after four and a half years, I had forgotten quite a bit. So, in order to refamiliarize myself with some of the things that happened in those years, I went back to the Board and, of course, after four and half years my files were defunct. So I went down to the attendance department and asked for copies of the monthly enrollment in October. The first two weeks, and I understand now it is the first week in October, is used as a basis of reporting to the State Department for the foundation program. So, I got copies of the enrollment from, I think it is, 1941, and I didn't have time to complete it, but it did give me the attendance pattern of the schools. I went over the exhibit that Mr. Krebs supplied for me that had the building information on it and also went to the vault where all the minutes of the Board of Education were kept, and I used the index to look up items of schools that I had forgotten about, boundaries and boundary changes and things of that

nature that were a matter of record in the Board of Education minutes to refresh my memory.

Q. Now, your deposition was taken in this case on October 24, was it not?

A. I think that was the date.

Q. At that time had you completed your study and analysis that you have described to us?

A. I have refamiliarized myself with a lot more since then.

Q. How long before your deposition had you actually been retained in this case?

A. I don't remember. I know the Board met on Thursday night and it was at that meeting that I was retained and Mr. Krebs called me to come down on Friday, and he outlined schedually what he would like for me to do to assist in this matter, and I think it was the following Tuesday. So, I probably had about a week and two days since to go back over some of the things that had happened while I was down there before the deposition.

Q. During your period of tenure with the Dayton School System, what was the practice of the system with respect to distribution of supplies to the various schools?

A. Well, it is always on a per pupil basis. Again, I used the October report, the special report to determine the enrollment in each individual school, the kindergarten enrollment, the special education enrollment, the industrial arts enrollment, the home economics enrollment and all of that, and each one of those had a specific rate or amount of money that was multiplied by the number of pupils in the particular building, and that was compiled and given to the purchasing department.

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Q. You may complete your answer, Mr. Curk.

A. I need to have part of it read back to see where I was.

A. And the purchasing department would notify the principal or the responsible person in the representative buildings and that would be the basis for expenditure of the next year's budget.

Q. All right. Was the practice the same with respect to each school in the system?

A. Yes, sir.

Q. Were there ever any junior high schools in the Dayton School System?

A. The junior high program started, oh, in the middle or late twenties, I think maybe 1925 or 1967, and then in the middle or late thirties Dr. Oley from the Ohio State University headed up a survey commission. I forget the title of it, but the sum and substance and result of that was a recommendation that the Dayton Board of Education eliminate its junior high school and go from a 1 through 8 and 9 through 12 organization.

Q. Was that recommendation accepted?

A. It was accepted and the junior high school was eliminated in September 1940.

Q. After the elimination of the junior high school in 1940 were there ever instances where 7th and 8th graders were assigned to specific high schools?

A. Quite often.

Q. What were the reasons for that and when did it occur?

A. The reasons for it would be overcrowding in the elementary buildings, and it would be a temporary condition until arrangements could be made to provide classroom space to accommodate them in their own building or maybe a new building constructed.

Q. Can you tell me what high schools in the system were affected by this?

A. Well, Dunbar, Roosevelt, Kiser, Colonel White, and Stivers. I am not sure of Belmont and Wilbur Wright, whether they ever had 8th graders or 7th and 8th graders. I would have to check my records on that, and I don't know if they are complete enough to give me that information.

Q. There has been some evidence here concerning assignment of the 7th and 8th graders from Garfield or Willard Schools to Dunbar in the early '40's, I believe 1942. Do you

have any records to indicate what the situation was on assignment of students throughout the system at that time?

A. Well, when I took my attendance patterns and copied them off from the child accounting record, and that was one of the reasons I did it, to get a feel for this, and there was evidence I think, if my memory serves me correctly, that in 1942, the year in question, Roosevelt and Kiser, I think, either Kiser or Colonel White, I think there are two other schools other than Dunbar that housed 8th graders or 7th and 8th graders.

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Q. Mr. Curk, with respect to Garfield, or Willard students who received temporary assignments in the 7th or 8th grade to Dunbar High School, can you tell us whether those students retained the option of going on to Dunbar or Roosevelt High School after completing their 8th grade education?

A. Yes, they would have.

Q. Are you familiar, Mr. Curk, with the boundary changes affecting Garfield, Willard, and Wogaman that were adopted by the Board in December of 1952?

A. Yes, I am.

Q. And can you tell us the circumstances leading up to those changes and what was done?

A. I am not sure whether it is 1952 or 1953 or when it was, but Mr. French called Representative leaders of the various west side organizations in for a conference, and he explained to them what we had planned to do in our building program to provide school facilities for the mushrooming school enrollment and said that we can do one of two things. We can enlarge Garfield and Willard the same as we are doing for all the other buildings in the city, or we can shrink those boundaries and not add onto those buildings to take care of the increased density of population would allow some of the students in the periphery of those respective districts to attend integrated school systems, such school districts as Edison, Irving, and Whittier and so on.

Q. And what plan was actually adopted by the Board that you referred to?

A. Well, I think it was Plan B they recognized the opportunity and elected Plan B, and that was what was recommended to the Board, and that was the plan adopted.

Q. And just so the record will be clear, which plan was the B plan?

A. That was to shrink the boundaries around Garfield and Willard, and add what was taken away to the peripheral schools, to increase the enrollment pattern at the integrated schools.

Q. In the establishment of the Roth High School attendance zone in 1959, was race taken into consideration?

A. No, sir, it was not.

Q. At the time the attendance zone was established, were you asked to make any survey as to the race of the prospective students at Roth High School?

A. I evidently was. I don't remember the circumstances. But I was shown a report that I had made and it was a guesstimate more than anything else, because looking from the map and estimating that a hundred percent of the school would be feeding into Roth, and a hundred percent of this school, or 75 percent, or 80 percent, or 20 percent, whatever the case might be, and then applying that percentage to the guess of the enrollment pattern of the respective schools involved, I came up with an estimate that I thought that the Roth High School might open with a certain percentage of black students.

Q. And in addition to your check of the races of potential students in connection with Roth, were you also requested to compile information concerning racial distributions of students in the year before the Garfield-Willard and Wogaman boundary changes?

A. There again is one that I have forgotten. In the day of my deposition, I think I was asked a similar question, and I said definitely not. That day at lunch Mr. Krebs just showed me an exhibit that he had received, and I said I wonder

where that came from, because the way it is dated I would have done it, and I don't remember it.

And then later on, at the Board of Education offices, a member of the staff said here's a little goodie that you might remember, there's a worksheet, so I will have to admit that I did prepare the study and while the complete report wasn't on the exhibit, it was just excerpts from it, I suppose that's all that was left, but it seems for, I think it was a five-year period, starting in 1947 and ending in '51-'52, at that time the principals reported at the end of the year – one of the questions on the principals' report to the State Department was the number of Negros enrolled in that particular school that particular year.

Now, I have inferred from the reading of the excerpts that that evidently was my source of information, and I think I commented at the time that it was not reliable because it didn't represent the actual black enrollment at any one day, but the gross enrollment for that particular school year.

So that part of my deposition to the counsel, To Mr. Diamond, I was in error, but I was not aware of it at the time.

Q. Except for these isolated incidents, in 1952, and then in connection with the Roth guesstimate in 1959, did you ever compile or maintain any statistics concerning the race of students in the system during your 18 years as Director of Research?

A. No. We were not conscious of that, at least I wasn't, because at that time it was madatory that we take the census enumeration each May for all of the school-aged children from five through seventeen.

Well, we asked our census enumerators to include anybody born in May at the time that they took the house to house contact, and so we had it from birth through seventeen.

The only information that involved us too much in our projected enrollment figures was the number of parochial students.

Now, we were allowed to ask – the enumerators were allowed to ask if they were going to send their children to parochial schools or to public schools.

So that final tabulation for each school district would indicate to me the number that were attending public schools and the number attending parochial schools, and that the the intimation that I used to develop the survival rate or experience formula for each school district in the projected enrollment. Race was not involved.

Q. Did you have anything to do with the Ohio Civil Rights Commission student surveys that were made in 1963 and subsequent years?

A. No, I did not.

Q. Except for the 1952 attempt to provide more interracial experiences by shrinking the boundaries of certain black elementary schools, did the race of potential students ever play any role in the setting of attendance or optional zones in the Dayton School System?

A. No, sir, it did not.

Q. What factors were taken into consideration in fixing attendance and optional zones?

A. Well, I suppose the prime factor would be availability of space and then the next would be the distance factor. Any hazards that would be present, going to and from school, and accessibility.

I think those four would be the major factors that we took into consideration.

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[R. I. 1882-1897, Vol. 18] Q. All right. Let's move to this eastward path. The next one we would encounter would be the Roosevelt-Colonel White optional area, would it not?

A. That's right.

Q. Most of that option was originally established in 1951, as I understand it, is that correct?

A. Yes. It was a change in the original high school boundary between the Fairview-White complex and Roosevelt. The original boundary was at Oxford Avenue, extending

from Salem over to a point west of Philadelphia. And then this optional area in 1951 came along and went from Oxford to Lexington to Grand and Superior. So there are three blocks north and south that extended from Salem Avenue to Rosedale.

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Q. Salem Avenue on the east side?

A. That's right.

Q. And can you give me the other one?

A. Superior Avenue on the south.

Q. All right. This would be Superior Avenue running east-west to what is now the complete area?

A. I would assume that is Superior. That is the general location of it, yes, sir.

Q. All right. Then it went where?

A. To Rosedale.

Q. All right.

A. And then south on Rosedale to Riverview. Just one line there.

Q. And then where on Riverview?

A. And then west and northwest on Riverview to I think it's pretty close to what used to be called Bessie Little Bridge, or Alcott Avenue came down there, so the extension of Alcott to Wolfe Creek, and then up to Athens, north to Athens, and then east on Athens to Philadelphia, south on Philadelphia to Oxford, and east on Oxford to point of beginning.

Q. In what attendance zone had that area been prior to the creation of this option in 1951?

A. Roosevelt.

Q. How long had it been in Roosevelt district?

A. Well, the original was 1940. This is '51. It would be 11 years.

Q. What was the reason for setting up the optional zone in 1951?

A. Well, this was a little unusual.

If you will remember, one of our factors in setting up

boundaries was distance, and here we are attempting to have a point equidistant from one campus to a split campus.

So at the time that was done, they had to consider both of the distance to the Colonel White area, which housed 9th and 10th grades, and also the distance to the Fairview building, which housed 11th and 12th grades.

So that was a little difficult to do.

And then as the transportation pattern and city transit changed and we were in the process of our building program to give relief to various buildings, they decided to make this an optional area, and while doing so they had to make it as fair for those 9th and 10th graders, and also include the 11th and 12th graders. So that was the reason, I think, for the extension, clear to the west side.

Because as you know, as it goes west, the accessibility to Fairview increases because it is directly up Philadelphia Drive, and I don't know exactly where the gasoline bus made its loop.

I think it was around Cornell, but it might have been farther north, up around Otterbein. I'm not sure.

But there was a gasoline bus which facilitated transportation on Philadelphia, the same as the city transit change transportation on Salem Avenue.

THE COURT: Mr. Curk, why should this not have been transferred to the Colonel White-Fairview District? Why make it an optional zone?

THE WITNESS: Well, Your Honor, I think it dates back to — when 1940 came along, prior to that time to my knowledge there were no high school boundaries. For years anybody in Dayton had a choice between Steel and Stivers. And then Roosevelt came along in the '20's and I'm not aware of any hard lines being drawn in the '20's. So we had a choice of three high schools.

And then when the junior high school program was eliminated and some of these junior high school buildings were converted to high school complexes, it was decided then to make hard lines between these high schools that were then

in existence, and I think that is the first time they ever attempted it, and they had quite a period of resisting change.

THE COURT: What date was this that these lines were drawn?

THE WITNESS: 1940.

THE COURT: This is now 11 years later?

THE WITNESS: Yes.

THE COURT: Why would there be an optional zone created 11 years after you have set up boundary lines?

THE WITNESS: Well, the original lines was again an attempt, I think, to equate the distance between these two complexes and Roosevelt, and if you looked at the eastern side of this optional zone and compare it with Fairview, it is farther, much farther to Fairview than it is to Roosevelt, but yet if you compare the distance from that eastern line to Colonel White, it is much closer than it is to Roosevelt. And then as you go westward, the distance factor changes.

So whether that is sufficient reason for not doing it, Your Honor, I don't know but I'm positive that that was part of the consideration.

THE COURT: Do you have any record, or is there any record of requests that this be made optional for those students who would otherwise go to Roosevelt?

THE WITNESS: Yes, it is a matter of record.

You see, your Honor, I just happened to live three doors south of Oxford when I was teaching at Roosevelt, when this change was made, and just two doors from me there was a child who tried to give a false address so that he would be in the Fairview District instead of the Roosevelt District, and that was quite common. There was a great deal of pressure and requests to the Board to change the boundaries to suit one or more of their conveniences. And this was resisted, as I say, until 1951, when the transportation pattern, the city transit pattern had changed, and the accessibility was a factor that had greater impact, I think, on the decision than the lack of it before.

THE COURT: And if I understand your answer correctly, this is really a matter of convenience and only that?

THE WITNESS: I think it was, sir, yes, sir.

THE COURT: Was there anything else?

THE WITNESS: To my knowledge, no, nothing else was considered.

THE COURT: No. I'm not talking of the convenience of the students only. It was the convenience of the parents and convenience of the Board, is that correct?

THE WITNESS: Well, I don't know how to answer convenience to the Board.

THE COURT: Well, if there were pressures both ways, this is a political body, and political bodies are amenable to pressure.

THE WITNESS: So if they succumb, well, it is a greater convenience to them, I would agree.

THE COURT: You may proceed, Mr. Greer.

Q. In setting up this optional area in 1951, or any of the other optional areas, setting them up in this manner instead of changing hard boundaries, were previous patterns of attendance taken into consideration?

A. Well, I think that's generally true and accepted, that once a child has been in a school, the older children coming along have a tendency to want to attend the same school.

Also, if they are attending an elementary school that happens to be divided between two high schools, and their friends are going to one and they are going to another, there is a reluctance to accept that. So in that context, I think you are correct. The attendance pattern does influence some of these desires.

Q. Now, if we leave out Fairview High School for a minute and just consider access from this area to Roosevelt or to Colonel White, what can you tell us about the physical characteristics of the area as they reflect on access to those two schools?

A. Well, we had a bridge across Wolf Creek at Summit Street. There is a bridge across Wolf Creek at Rosedale, which is in about the center of the optional area, and there is a bridge

across Wolf Creek at, as I referred to, the end of Riverview, the Bessie Little Bridge.

So those three streets would have to be their main approaches from this area north of Little Creek to Rosedale.

Now, Rosedale I am very familiar with because that was my path when I taught at Roosevelt.

On the west side of Rosedale, it was occupied by the Dayton Tire and Rubber Company. Their plant was not adjacent to Rosedale, and in the years before they expanded, this was just an open field and not utilized as a parking lot as it is now.

The area on the east side of Rosedale, between the railroad and Western Avenue, was sort of a holding yard for the packing company in there that was located at the corner of Rosedale and Western, and then the Pennsylvania Railroad, was directly, oh, I would say within one city block south of Riverview, and on the west side it served the Dayton Tire and Rubber Company and its switch yards, on the east side there were a number of coal yards between the railroad and Riverview, and down close to Summit Street was a large company, Simmons, Board and White.

Does that answer your question? Is that what you have in mind?

Q. That answers me on the southern end.

What physical factors are there that would have some bearing on access at the north, as far as students in that area going up towards Colonel White?

A. Well, I don't know of any.

Of course, Salem Avenue was the main artery through there, but there were many connecting streets that would allow these people to move north to Colonel White, many connecting streets and cross streets.

I don't think there were any physical barriers on the north side, between this area and Colonel White.

Q. As I understand it, the problem really was not access to Colonel White, but following on to Fairview High School after the completion of Colonel White.

A. There again, it was a distance factor that was added onto it.

Q. And you indicated about the change in the patterns of the City Transit Bus Company.

What, in 1951, were the public transportation patterns from this area to the vicinity of Fairview High School?

A. Well, I don't know the exact year that it changed, but in the early years the City Transit had a line that crossed the Main Street bridge, the Miami River, Main Street bridge, turned up River Road, up Forest Grove, up Forest Grove to Neil, Five Oaks, went up Five Oaks, or down Five Oaks, over to Salem Avenue, and up Salem to Catauqua Drive where it made its loop.

And then there was a line on Salem Avenue —

Q. First of all, the east end of this optional zone was on Salem Avenue, is that right?

A. That's correct, and this bus facility going up to Colonel White or past — relatively past Colonel White went out to Fairview, would come out on Salem, maybe four or five blocks north of Oxford Avenue, before it hit Salem.

But there was another line on Salem Avenue that looped around Salem and north, which was south of the northern part of this boundary, and then those lines were consolidated, and the line that traversed Salem Avenue from north-southward was combined with the other line and went out to Catauqua, up Catauqua, and as I understand it, I think it now loops around Catauqua, Hillcrest, Philadelphia and back on Salem.

Q. All right. If we look to the west side of the option, which went down to Riverview, what was its access situation?

A. Well, as I mentioned, this gasoline bus — and of course, I was familiar with the bus coming down Philadelphia and going down Riverview to Salem Avenue, and then crossing the bridge there and going on downtown, but the exact northern culmination or loop of that gasoline bus I am not quite sure of, whether it is on Otterbein or where it was.

Q. What about the access from this area in 1951 by public transportation to Roosevelt?

A. Well, there was no crosstown public transportation. If the students elected to use public transportation to get to Roosevelt, they would have to use either the Salem Avenue line or the gasoline bus, go downtown and transfer to the Third Street line and go west on Third Street to Roosevelt.

Q. Now, this optional area was later expanded to its present form, was it not?

A. Yes, sir.

Q. When was that done, why, and what was involved?

A. Well, by 1959, I think, was the first graduating class from Colonel White. So the Fairview-White complex was divided, I think, in 1955, '54 or '55.

Q. If you want to refer to any notes that you may have, why feel free to do so, Mr. Curk.

A. Well, if that date is important, I'll try to do it.

My note here says 12-4-58, when the boundary line was changed.

So the concept of the four-year high school at Fairview and the four year high school at Colonel White would be effective in the '57-58 school year, when Colonel White would have its first juniors and then in '58-59 it had its first seniors and first graduating class.

THE COURT: Mr. Curk, this has been referred to as the Colonel White-Roosevelt optional zone. Do I understand that after 1958 this was a three-way optional zone, also including Fairview, or was it limited to Colonel White and Roosevelt?

THE WITNESS: No. It was a three-way option, between Colonel White and Fairview — I mean Colonel White and Roosevelt, and Fairview and Roosevelt.

The line between the Fairview and Colonel White was drawn so that Philadelphia, the lower part of Philadelphia, was still a part of Colonel White area, and it came up to, I think it was Otterbein Avenue, and then extended east.

THE COURT: I'm not interested really in the specifics. All I want to know is do I understand that any student living in that area could have chosen one of those three schools?

THE WITNESS: No. They could have chosen Fairview and Roosevelt, on the west side.

THE COURT: Do I understand that this is really two optional areas?

THE WITNESS: Two optional areas.

THE COURT: All right. Roosevelt versus Fairview and Roosevelt versus Colonel White. It was not a three-way option?

THE WITNESS: Not a three-way option, no.

Q. What was involved in the change that was made along about the time that Colonel White became a four-year high school?

A. Well, the area bounded by the east by Salem Avenue was moved southward from Superior to Riverview and on down to Wolfe Creek.

Now, Superior to Riverview is a long square, and Riverview to Wolf Creek is a short square and that extended over to Rosedale, which was the beginning of the former optional area.

So it was bounded on the east by Salem Avenue, on the west by Rosedale, on the north by Superior, and on the south by Willard.

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[R. I. 1898-1899, Vol. 18] Q. Let's proceed on east to the Kiser-Colonel White option, which I understand was established in 1962. What can you tell us concerning that optional area?

A. My memory is faulty there, Mr. Greer. I don't remember that. I'm sure that it was considered at staff, brought up at Staff and discussed, but I have no recollection of it at all.

Q. In reviewing the records of the Board, what can you tell us about the racial characteristics of the students at each of those schools in 1962, when the option was created?

A. Well, we have no record for 1962. The closest record we have would be the 1963 Ohio Survey and at that time Kiser was 2.7 and Colonel White was 1.1 percent black.

Q. And what can you tell us about the capacities of the two schools at the time this option was created?

A. Kiser was one of those schools that was a combination junior high school-high school. In other words, at one time it housed the 7th, 8th, 9th, 10th and 11th grades, back in the mid-thirties and then it was converted to a high school and its attendance zone traditionally has not been as densely populated as the other attendance zones or the other high schools in the city.

So I would assume that the capacity of Kiser, there was always available space there, and enrollment would be low after the junior high days.

Q. Was this optional zone taken out of the old Kiser attendance zone or out of the old Colonel White attendance zone?

A. Out of the Colonel White attendance zone.

Q. All right. Let's move on then to the last of the four high school optional areas, which is an area on the east side of Dayton between Wilbur Wright and Belmont, is it not?

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[R. I. 1904-1918, Vol. 19] Let's start with the optional area that exists between Belle Haven School and Ft. McKinley School.

Can you tell us when that was created and why it was not created with hard lines?

A. It was created in 1955, and there were two factors involved in that. One was accessibility and the other was hazards.

Q. What were the accessibility and hazard factors involved?

A. Well, the streets could not have openings to the east to Salem Aveune which would involve the accessibility, and, of course, Salem Avenue is a major artery and would offer a hardship factor or hazard factor.

Q. The next optional area if we start at this same end of

the map and work our way east would be the two optional areas that presently exist between Residence Park and Jane Addams. Can you tell us when they were created and why they weren't drawn with hard lines?

A. In September of 1959, the large one in particular, the entrance to this residential area is off of Hoover Avenue and had no access to the south to Jane Addams School, and in order to exit from this area, they are actually closer to Residence Park before they can continue on their way to Jane Addams, so it is an accessibility factor. The little one square block is about as equadistant as you can get.

Q. As to the Belle Haven-Ft. McKinley and the larger Jane Addams Residence Park optional areas, was there any consideration given to potential development?

A. Well, I think the way districts were drawn was with anticipation of future residential development to open up accessibility, and after that had materialized, it would logically belong in that particular attendance zone.

Q. Do you know whether the development that was anticipated in those small areas actually has come about?

A. Well, to my knowledge, neither one had developed to the point in the Belle Haven-Ft. McKinley, to the east of Ft. McKinley or to the south to Jane Addams.

Q. Going further east, then, to the next optional area which is an optional area between Westwood Elementary School and Jackson Elementary, can you tell us when that option was created and why it was drawn other than by hard lines?

A. That was in 1952, and again the area is about as equadistant as you can get between Jackson and Westwood, and it was changed to an option area because of the hazard of the young children crossing Third Street which is a main east-west artery through the city, carrying not only the city traffic, but U. S. 35 traffic.

Q. Was there anything distinctive about the way that option operated with respect to classes in either school?

A. Yes. This was an unusual situation because of the

hazard. It developed that in 1952, the first year that it was in operation, it involved only kindergarten through grade 3. Then, each subsequent year another grade level was added. In other words, the third grader that had optioned to Westwood would remain there for the fourth grade and the following year for the fifth grade and so on, so it was progressive upward by grade level in successive years.

Q. Which way did the option run?

A. It was originally part of Jackson and was optioned to Westwood and I think the records from the Board minutes will show that later on it was changed and made a part of Westwood with an option to Jackson.

Q. Continuing east through the city and crossing the river, the next one we come to is an optional area between Lincoln and Horace Mann Elementary Schools, is it not?

A. Yes. That area was made optional in 1957 and again by the request of parents, and it probably would be farther to Horace Mann than to Lincoln, but yet it is an area right at the intersection of Wayne and Wilmington Avenue, and Wilmington Avenue would be a direct route to Horace Mann. To get to Lincoln, they would have to wind in and out and turn course, so directness and the fact it was practically equadistant would be involved.

Q. The next optional area as we move east is between Cleveland and Belmont Schools, is it not?

A. Yes. That is a triangular effect. It is an area between Watervalete on the south and Wayne Avenue on the north, and Watervalete probably has greater traffic than Wayne Avenue, but they were trying to encourage the youngsters to go to Belmont, but they had the option of going to Cleveland if they so desired, but either way they had to cross a main thoroughfare.

Q. What was the reason for not making that an area in one or the other district with hard lines?

A. I think the attendance pattern there probably was the major factor or convenience to the people living in the area

and using the criteria to determine a hard line, it probably wasn't there, no justification to say this is that much closer or that much farther and so on.

Q. Continuing then to the east, the next optional area would be one between Grand and Belmont Eelementary School, would it not?

A. Yes. That area again, the distance factor is probably about the same between the two schools and again it was convenient to the parents in the area with not justification to refuse their request.

Q. And finally we have an optional area between Lewton School and Eastmont, I believe, isn't it?

A. This was an unusual situation in that it involved two principal streets, Quimby Lane and Shafer Road, that exited to the north on Xenia Avenue, or U.S. 35 and they were not completed to the south, so that they would access to the Eastmont School. So they would have to exit from this area to the north and then go either east or west, east of Lewton or west to Eastmont, or vice versa. Excuse me.

West to Lewton and east to Eastmont.

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Q. Is that Eastmont and Kemp?

A. Eastmont and Kemp. Not Eastmont and Lewton. This isn't Quimby Lane then.

Well, even so the people in this area here have – excuse me. I should stand on the other side.

The people in this area here would have to go around this way and there is no exit from this residential pattern to Eastmont.

These people can come across this way.

These people have no access to this except going in and around about way. There is Woodman Drive, which recently is a very highly traveled street. That formerly had not been cut through. But now that is cut through and it is almost like a peripheral highway.

So I would say there it would be two factors: Hazard and accessibility.

Q. Now, if we recede into the past during your tenure with the School Board, there were at least up until 1969 when the Stivers boundary changed, two other optional high school areas were there not, between Stivers and Wilbur Wright and Stivers and Belmont?

A. Yes, sir.

Q. And can you tell me when those options were created and why they were not created with hard lines?

A. Well, they were created in 1956 with the opening of Belmont, and the Belmont area relieved the Stivers School District more than Wilbur Wright, and the optional area between Stivers and Belmont was at the extreme south and accessibility to either of the schools was difficult.

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Q. Let's go to elementary schools prior to 1972, and during the period that you were with the School Board, there was at one time an optional area between Fort McKinley and Fair port, was there not?

A. Yes, sir, and that was two factors involved in that: Accessibility and hazards.

Q. What were the nature of the accessibility and hazard problems that caused that to be drawn as an optional area?

A. The difficulty to getting to Salem Avenue on the east. They would probably have to go west to Gettysburg, and the crossing at Gettysburg and Salem Avenue is quite a difficult crossing.

Q. At one time there was also an optional area between Fairport and Fairview Elementary Schools, was there not?

A. Yes. That was part of Fairview, made optional to Fairport. Again it was the Salem Avenue traffic hazard.

Q. What was the date that that was created?

A. I have 1960.

Q. Now, at one time there were two options, were there not, between Fairport and Cornell Heights?

A. Yes. Again it was in 1960, and this was new residential development where accessibility was definitely a factor, because there were not through streets and it was hoped that eventually development would continue those streets so that there would be more direct access.

Q. At one time there was an optional zone between Jefferson and Cornell Heights, was there not?

A. The only difficulty there was that these two squares south of Cornell were about three blocks long. It was between Princeton Park and Cornell, and on Oxford Avenue to the south – the first through street south of Princeton Park, and it extended from Everett Drive to Vernon Place to Windsor to Rosedale. But these three very long blocks north of Princeton Park had no dividing line between them in order to make them equidistant. There is no natural line. You just have to follow maybe a property line on this side of the street and a property line on the other side. So since it was a distance almost equidistant, it was made an optional area.

Q. What about an optional area that existed between Jefferson and Brown at one time? What was the reason that was made and why was it made without hard lines?

A. Well, there again it was a crossing at Cornell and Salem Avenues. That was a hazardous crossing.

Q. What about the optional zone that formerly existed between Jefferson and Edison?

A. This area involved the – again, I shouldn't take time to name streets, but it was about equidistant and more direct to Jefferson and more roundabout crossing the railroads and so on to Edison.

Q. What about the optional area that once existed between Westwood and Gardendale? When was that created?

A. That was in 1957.

Q. What was the reason for drawing that as an optional area rather than with hard lines?

A. Well, this was one of those unusual situations where the boundary line was drawn close to Westwood in order to give it as much relief as possible, but also recognizing that

Gettysburg Avenue, which they would have to cross to get to Gardendale School, was a four-lane highway.

Q. Were there any other access factors in that area between the optional area and Gardendale School?

A. Well, they weren't insurmountable, because they were so close to the school, even though they had to wind their way around to get there, it wouldn't have caused that much extra distance.

Q. What about an optional area that formerly existed between Residence Park and Jackson for students at the Veterans Administration?

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A. The north boundary of the Veterans Administration was Third Street, which was the south boundary of Residence Park. The east boundary of the Veterans Administration was the west boundary of Jackson. And I think it was in 1951, the Board of Education passed a resolution that if there were elementary school children residing with their parents on this facility they would have the option to Residence Park or Jackson.

Q. Was there formerly an option between Greene and Garfield Schools?

A. Greene and Garfield?

Q. Yes.

A. I'm not aware of that.

Q. Was there formerly an option between Irving and Willard Schools?

A. Yes.

Q. And there were three options in a row there, weren't there, on kind of a diagonal?

A. Yes. They involved Willard and Irving, Willard and Whittier, and Miami Chapel and Whittier, and those were three triangles, two of which were bounded on two sides by railroads and the third was bounded on one side by a railroad.

Q. And what was the reason that they were set up without hard lines?

A. Because of the hazard giving the option not to cross the railroad.

Q. Then, as we move on through the city, there was at one time an option between Cleveland, Lincoln, and Franklin Elementary Schools, was there not?

A. That was caused by the construction of Highway 35 and its exit ramps which changed the accessibility factor materially.

Q. What was the reason for not drawing that one with hard lines?

A. Well, I think it was left to the pleasure of the parents how they were going to instruct their children to go to school because of the difficulty of access.

Q. Now, at one time were there some elementary school optional areas involving Orville Wright Elementary School?

A. Orville Wright and Kemp, the eastern area I have it as approximately equadistant, and the southern area was accessibility.

Q. Was there any reason for drawing those as optional areas rather than hard lines?

A. Again, there is no justification to refuse the request of parents.

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Q. Mr. Curk, you testified this morning you obtained the racial counts which are found in PX-104; that is, the 1940 to 1951 racial data, that you obtained these from principals' reports?

A. 1940 to 1951?

Q. I think 1947 to 1951. I am sorry.

A. Well, I don't remember the report, Mr. Lucas, but there is an attached document to that which indicated that I did get it from the principals' report as I gave in direct testimony this morning.

Q You said that the principals reported at the end of the year and one of the questions on the principals' report to the State Department of Education was the number of Negroes enrolled in that particular school that particular year.

A. That's my understanding, yes.

Q. So, from 1947 to 1951, at least, the principals' reports carried that information to the staff, is that right?

A. Evidently. I don't remember it, but evidently from that document.

[R. I. 1921-1922, Vol. 19] Q. And you were present and, therefore, knew what the decision-making process was during that period of time?

A. Normally I was present, yes, sir.

Q. And I believe you also stated that after Dr. Goff took Mr. Armstrong's place – was it in 1964?

A. I think that was the year.

Q. But you were not as involved but was kept advised of any major decisions and memorandum; is that correct?

A. That's correct.

Q. And did you go to the Parker School?

A. I did.

Q. Maybe I am embarrassing you, but can you give the year you went to Parker School?

A. Well, let's see. I will have to count backwards. It would be in the year 1919-1920, I think.

Q. Was Parker a city-wide ninth grade school?

A. I think it was at that time.

Q. So, just one grade was in that building?

A. That correct.

Q. Do you recall how many students that involved at that time?

A. I have no way of knowing.

Q. Was that building still in use when you came with the System as an Administrator?

A. Yes, it was.

Q. Now that I have referenced that, can you give any idea of the size of the building in terms of capacity?

A. Well, it was put to a different use, of course, in subsequent years, and that would probably decrease the number of students that it could accommodate due to its different usage, but I would still hesitate to hazard a guess.

Q. But it was the co-op school for Patterson; is that correct?

A. That is correct.

Q. Now, this was a city-wide ninth grade. Were there any other ninth grades in the System that you know of?

A. Not to my knowledge.

Q. And that was part of the junior high setup that the System had back then?

A. This is before the junior high, sir.

Q. That's right. Junior high started in the '20's?

A. That's correct.

Q. O. K.

Were there attendance boundaries for other schools at that time? I take it the attendance boundary for the ninth grade was the entire city limits.

A. Yes, sir.

• • •

[R. I. 1928-1931, Vol. 19] A. Before I could answer that question, the foreword to that table says "The following table is based upon the present rating capacity of each building", and so forth, Pages 8, 9, 10 and 25, I guess it is, of this survey.

Q. The next paragraph though says "The estimated number of pupils from Mad River Township was based upon estimates secured from the county superintendent's office and our own experience table."

I guess my first question is, at the time this report was prepared were the Mad River children coming in to those schools?

A. Evidently so, yes, sir.

Q. And am I reading the table correctly to say that 636 was the number and that the numbers that appear thereafter are the projections that you are making?

A. I think that would be correct.

Q. Do you know whether or not the enrollment patterns actually continued as projected or did they drop off or cease?

A. Are you talking about the Mad River students?

Q. Yes, sir.

A. I don't remember whether I continued updating that attendance record or not.

Q. How long did they continue to utilize space in those schools?

A. I can't answer that question either, because it is recommended and I think whatever the year was, I think they were in the process of erecting their own high school building, and it wasn't two years after that they stopped bussing their children in.

Q. They provided the bussing into these schools?

A. Oh, yes.

Q. And did this affect in any way your capacity decisions in terms of having to add the capacity of various schools because of this influx of students?

A. No. When you say various schools, you are referring to what, sir?

Q. Assume, and I'm trying to read your table, and if I am wrong please correct me, but this Mad River assignment applies to Kiser, Wilbur Wright and Stivers only.

A. And it is a heading which applies to their new high school.

Q. This says available space in high school buildings, and the last column has Mad River High School pupils, so I assume that that affects those three schools and only those three schools?

A. Well, the projection included the new high school. That's what I'm trying to tell you. There is a column for the new high school, and the other columns would be adjusted accordingly.

Q. And you are in effect including in your projection of high school needs at that time building and space then for these Mad River Township children?

A. No, I don't think so, bebcause I think as I read trying to prepare my answer for you, on Page 8 I said excluding the Mad River Township pupils. I think that is on Page 8.

Q. "They do not include any large number of tuition

pupils such as those that we receive from Mad River Township."

The question is, does the table in Part V, where you have those additional numbers in the right-hand column, is that reflected at all in the utilization figures that you have for those other schools; Kiser, Wilbur Wright and Stivers?

A. No. For instance, just to check, in 1955-56, 225, 330 would be 555, and 289 would be 844, and 714, you come up with your 1522. Well, it's blurred so that could not include the 763 that is out to the right-hand table or column.

Q. Well, this column says that is available space, and I take it that means in 1955-56 there were 225 spaces in Kiser, 300, and it looks like 360 spaces in Wilbur Wright, and 289 spaces in Stivers; is that correct?

A. I think that would be correct.

Q. All right. That indicates that you have whatever the sum of that is in spaces available as of '55-56, and then you are projecting a new high school to add a total of 714 spaces, is that correct, because it doesn't exist. You projected it.

A. Yes.

Q. All right. So that the sum of the total, in the second to last column, would be the sum of extra space available, assuming the new high school was built?

A. That's correct.

Q. So that you have that much extra space, 1588, or maybe 1533. It's a little blurred.

A. Yes. Projected for that particular year.

Q. There would be that much extra space, and you projected you would have 753 Mad River pupils for that period, didn't you?

A. Correct.

Q. Thank you for clearing that up.

Now, in your deposition you told Mr. Diamond that you never considered race whatsoever.

A. In projecting enrollments, that is absolutely correct.

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[R. I. 1953-1954, Vol. 19] Q. Are you familiar with what areas that you were doing transportation in before you retired?

A. That was not my domain, but I was familiar with some of them, yes.

Q. Can you give me several illustrations?

A. Well, in the northeast was probably most difficult. Formerly, the northeast area was all transported to McGuffey, Webster and Allen, and then it was reduced to Webster and Allen and that, of course, was again an accessibility pattern as well as distance, and then in the extreme northwest, the people out around the extreme upper left of the map.

Q. Can you refer to it by school zone now?

A. Well, it is in the Shiloh zone.

Q. Thank you.

A. And those people were bused into Shiloh.

Q. They would have gone to Meadowdale at that time?

A. Well, the period I am talking about, they went to Fairview.

Q. Was there any transportation down in the southeast area?

A. There was at one time transportation in the Wogaman area when Wogaman was overcrowded and the bus went down in the southern Harrison Township area.

Q. When Wogaman was overcrowded what period would that have been, approximately?

A. Well, I think that would cover a span of years. I don't know.

Q. Fifties or sixties?

A. I am referring to early '50's before Highview was constructed, Highview being constructed it had a tendency to relieve Wogaman, and then –

Q. Highview –

A. Do you want me to continue?

Q. Highview, I believe, was built in 1951.

A. I think so.

Q. All right. You say that the Wogaman children were taken to where?

A. Well, the Highview District was a part of the Wogaman District at that time, and Wogaman was overcrowded and pupils were bussed, I think, to Irving.

Q. You mentioned something about Harrison Township.

A. Well, the southern part of that area at that time was not in the city, but a part – now wait a minute. It might have been, but it was formerly southern Harrison Township. Maybe it was in the city at that time. I can't say for sure.

Q. The Highview School when it opened was only one percent black?

A. That's right.

Q. Were the white children being taken to Irving?

A. Well, I presume so.

Q. Instead of going to Wogaman which was overcrowded and which was black, they were taken to Irving?

A. That's right.

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Z. TESTIMONY OF WILLIAM GOFF.

[R. I. 1959, Vol. 19] Q. Try to keep your voice up so I can hear you way back here and let's start out by asking your name.

A. William Goff.

Q. Where do you live, Mr. Goff?

A. In Dayton, Ohio, 918 Debbie Court.

Q. What is your occupation?

A. I am Assistant Superintendent of Schools for Student Development.

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Q. How long have you held that position?

A. Just over eight years.

I have been Assistant Superintendent for four years. I have been in Dayton for eight years.

Q. Can you give us your educational background?

A. Yes. I attained a Bachelor's Degree in Psychology at

Ohio State and Master's Degree in Psychology at Ohio State University and the Doctorate in Exceptional Children Guidance and Educational Administration at Ohio State.

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[R. I. 1962-1963, Vol. 19] Q. What had been the practice of the Board with respect to transportation of students insofar as distances are concerned?

A. You mean prior to this policy?

Q. Prior to and after 1966.

A. Well, after 1966 the policy as it is stated here, did establish a 1.2 radial distance from an elementary school, that is outside the 1.2 mile, being a transportation area.

It also set up a series of criteria for high school transportation, too. The State law, as you are probably aware, does require only that students who are in elementary schools be transported if they are two miles or more from their school of attendance. This was at this time.

Q. All right. Was that the practice and policy of the Board?

A. The practice of the Board made use of the permissive part of the law which allowed over one mile from the school. So the 1.2 mile policy that was established here fit into the practice that was being exercised in 1966.

Q. What were the financial implications of the Board's transportation policy in the '60's?

A. Well, as a flat rate school district, the district received nothing for any kind of transportation of regular students.

There was reimbursement for handicapped children attending Gorman School for Crippled Children.

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[R. I. 1998, Vol. 20] A. The primary limitation in setting up the sites was the one and a half mile direct travel distance which was the transportation policy so that the youngsters could walk to the school rather than be involved in transportation. There were a number of other sites suggested, were there not? If I can name a few, tell me if I am correct. Jane Addams was suggested as a middle school, was it not?

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Q. Jane Addams, Meadowdale, Brown, Emerson, Kiser, were those some of the other schools?

A. I think some of these were identified in an Ohio State study prior to the time that we finally set them up, yes, sir.

Q. Emerson is actually a former junior high school; is that correct?

A. I believe so.

Q. And that would make it particularly suitable for conversion to a middle school?

A. Yes.

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[R. I. 1966-1976, Vol. 19] Q. Try to keep your voice up, Dr. Goff, because the Reporter also has to get what you say.

A. I see. All right.

The middle school, we looked for possibilities of middle school placement on the east side, on the west side, and in the north part of the city.

We had the assistance of Ohio State University through a grant that they had to put youngsters on large maps so that we knew where they were, since we do not have a central file system right now on every youngster, and with these maps we establish the individual schools in three sections of the city using what buildings we felt could be most adaptable to a middle school, and those who could best handle the eight to five youngsters.

Q. Was there any new construction involved?

A. No, sir.

Q. What students interracial experience, if any, were affected by the establishment of the five middle schools? Maybe you had best take them one at a time.

What about Orville Wright?

A. At Orville Wright, as far as a racial integration at that school, this was improved for the six to eight level by bringing youngsters who were formerly attending Washington Elementary School.

Franklin Elementary School, nothing was accomplished there as far as any racial improvement.

At Kemp School, the racial improvement there as noted on this exhibit, was due primarily to a housing development, not to a change in the boundary.

And in Washington School, Washington Elementary School, this did bring more white youngsters into Washington School. It brought white youngsters into Washington School who had not previously been with black children at this particular age level, and of course, it took out some of the older black children to go to Orville Wright.

Q. All right. And are the various mixtures and nonmixture of the races in the other middle schools shown on this Exhibit AW?

A. Yes, they are.

Q. Was there any reason for not establishing more than these five middle schools?

A. Well, it was felt that to begin with, with five middle schools, it was a pretty big bite in itself, and so basically this was an arbitrary decision, really, not to go into the whole district at once.

We were also introducing the individually guided educational program into the middle schools and into their feeder schools. So this, too, meant another kind of planning and reorganization for those schools.

Q. What is your relationship to the freedom of enrollment program that has been effected in the Dayton School System since its adoption in May of 1969?

A. The associate director for student relations administers the program itself.

I am his direct supervisor, and we work together when problem situations come up in the interpretation of the policy or how we would administer it.

Mr. Carroll is directly responsible for that, but he is a member of my staff.

Q. All right. The Court is already fully familiar with the policy and the various priorities in it.

Could you tell us just how the mechanics of the freedom of enrollment works? Are there cutoff dates or when is enrollment in the program effected?

A. Well, there is a time, and it has been twice a year enrollment dates, when youngsters may make applications for freedom of enrollment.

Administratively we would like to have a cutoff date simply to be able to clean things up. Our practice has been that we do accept youngsters even right on to until the time that the second semester begins, or the first semester and the fall begins. So we actually have no cutoff date. We have a beginning enrollment date when youngsters and their families are asked then to send their application in.

Q. How are enrollments projected for the freedom of enrollment program?

A. The guidelines that Mr. Carroll and I worked together on were simply to contact the principales of schools where youngsters had requested transfer and to get a number from those schools at various grade levels where the principal felt that he would have room. There is a comparison of this with the tentative organization that the principal must submit to the staff development department in the spring in order to plan for teachers for the coming year.

Q. What is the tentative organization for each school and how is it developed?

A. I guess a staff development person can answer this better, but primarily the principal and his staff must assess and make projections of their enrollments, relate this to their classroom space, and the number of teachers they then have, and then present that particular relationship to the staff development department for review.

There are various criteria established in Title I schools as

opposed to non-Title I schools. That is, the ratio, and I'm sorry, I don't remember these, but they differ for a center city school as oposed to a suburb, that is, the Title I being a lower pupil-teacher ratio. So the principal then uses this figure to estimate how many teachers he is going to need for the coming year.

Q. All right. And is the capacity insofar as freedom of enrollment is concerned tied in with the tentative organization worked out for each school by these various criteria?

A. Well, the principal himself is normally – for instance, right at this period of time, for transfers, he doesn't have a tentative enrollment. We are asking him if he has a vacancy for second semester. For the second semester he has a tentative enrollment, or a TO worked out, so that we can make some judgment as to whether or not he does have room in relation to what he is asking for as far as teachers are concerned. But we have depended upon the principal to give us this figure.

Q. Are you aware of anything to indicate that the freedom of enrollment program has not worked in a fair and impartial manner for all students in the system?

A. No, sir, I'm not.

Q. According to Defendants' Exhibit AD, in the present school year, there are only 178 students out of more than 50,000 in the System who were denied transfers under the freedom of enrollment program because of classroom space.

Are those figures and similar figures in the other exhibits concerning freedom of enrollment accurate to the best of your knowledge?

A. Yes, they are.

Q. What are hardship and emergency transfers, Dr. Goff?

A. These are individual kinds of situations which develop with a child or a student in a school which are a program in his adjustment or in his making progress in school, and each of these individual situations is reviewed to see whether or not it is apropriate to make any school transfers or whether

any other kinds of changes need to be made to assist that youngster in his school development.

Q. Let me refer you to Plaintiffs' Exhibit 16, which summarizes the hardship and emergency transfers for the present school year.

Do racial considerations play any part in hardship or emergency transfers, Dr. Goff?

A. No, sir, not within this policy at all.

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Q. What are special education transfers?

A. These are youngsters who are evaluated by school psychologists in relation to abilities, in relation to achievement, performance in school, and if eligible for state standard self-contained classes for educable mentally retarded, they are then placed into such a class with the parents' permission.

If there is no such class available for a particular age range at a school, that youngster is transferred to the nearest school where there is such a class available.

Q. Do racial considerations play any part in such transfers or assignments?

A. No, sir, they do not.

Q. What are disciplinary transfers?

A. I would assume the question really parallels the hardship and the passionate kind of transfers that does involve an evaluation of a situation in which a youngster has been involved in a discipline kind of way.

And if it is indicated that a school transfer would be helpful in improved adjustment for this youngster, such a transfer might be made.

Q. Do disciplinary transfers occur both within and without the context of the freedom of enrollment program?

A. Actually, they are without the context of the freedom of enrollment program. Disciplinary transfers are not considered freedom of enrollment transfers.

Q. And what are the criteria by which such transfers would be made?

A. Well, there would be a number of these. Actually we are looking at the child's immediate kind of adjustment in a particular kind of situation. But before a transfer would normally be made, we would also be expecting some other kind of supporting help for that youngster really outside the school system in most cases.

A caseworker from the Family and Children's Services, from the Juvenile Court, a continuing treatment program with a child guidance center, a children's psychiatric hospital under psychiatric treatment.

We look for something to give support to the child beyond just a matter of his being transferred from one school to the other.

Q. Do racial considerations play any part in these kind of transfers?

A. No, sir.

Q. Now, during your tenure with the Board, there have been a few special transfer situations involving Jefferson, Edison and Westwood Schools, have there not?

A. Yes, sir.

Q. I'll refer you to Defendants' Exhibit BA.

Q. Now, the Court is already familiar with these three situations, I think, so I will try to confine my questions to just certain aspects of them.

First of all, can you tell me the circumstances that led up to the Jefferson transfers and what caused those transfers to stop?

A. The Jefferson transfers were due to the crowded situation on that Jefferson campus.

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Q. Were the Westwood transfers a situation similar to the Jefferson transfers?

A. Yes, sir.

Q. And on the transfers from the Edison students following the Edison fire, was there a meeting of administrators the week following the fire, in April of 1968?

A. Yes, sir, there was.

Q. Were you present at that meeting?

A. Yes, I was.

Q. Was any plan adopted at that meeting regarding the assimilation of those students and the schools to which they were transferred?

A The plan adopted for the remainder of that school year was to transfer the teachers with the students to the schools to which they were assigned.

Q. Did the administrators the week following the fire adopt any plan with regard to what would be done the following fall?

A. I know of no plan being adopted for the following fall. My impression was that we were dealing with an immediate situation at this time and we felt that these youngsters should not be disrupted from their normal class.

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[R. I. 1991-1994, Vol. 20] Q. You were with the system in 1970, is that correct?

A. Yes.

Q. Are you familiar with the transfer of two children named Fielder (spelling) F-i-e-l-d-e-r, from Roth to another school in the system?

I believe it resulted in a law suit in which the Dayton School System was involved?

A. Yes, sir. I remember the case, not the details.

Q. I believe these students were Rob and Beverly Fielder, who were attempting to transfer from Roth.

Do you know what school they were attempting to go to?

A. No, sir, I don't recall specifically.

Q. Do you know what happened in that case?

A. As best I can recall, the case involving the girl in the family was brought to a preliminary kind of hearing in court.

Q. Let me ask you and see if I am correct.

The School Board did oppose the transfer of the students as

had been requested by the parents, and the parent filed suit, is that correct?

A. I'm sorry, Mr. Lucas. I have not prepared to look up that particular case. I just don't recall.

Q. I have a newspaper clipping.

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Q. Does that refresh your memory somewhat?

A. Yes. Thank you.

Q. Dr. Goff, am I correct that the students was, after the litigation in court, subsequently given a medical transfer from Roth?

A. Yes, sir. That appears to be the way that it is, as I recall from this.

Q. They did attempt to transfer without citing a medical reason, the Board denied it, and after the litigation I think the Board's possession was sustained, is that correct, but the student was subsequently permitted a medical transfer?

A. No, sir. As I would recall it from the information you have given me here, it was a decision worked out with the court that a medical transfer would be an appropriate kind of thing in this situation. There were two youngsters involved, and the girl was given the medical transfer on the basis of medical information submitted.

Q. And is it your understanding that that medical information was not submitted initially, is that correct, with the application?

A. As best I can recall, yes, sir.

THE COURT: Mr. Lucas, before you leave this, may I ask the witness one or two questions.

What was the Board's reason for denying the transfer, Dr. Goff?

THE WITNESS: Well, I would assume there was no specific reason for it, Your Honor.

THE COURT: I though that the School Board operated under freedom of choice.

I am aware of the priorities, by the way, but I am curious as to what reason was assigned for the refusal to permit this child to transfer?

THE WITNESS: Well, as best I can recall it would be simply because they weren't the girl nor the boy, qualified under the freedom of enrollment to be transferred.

THE COURT: They sought to transfer from Roth to what school?

THE WITNESS: Again, I believe it was Fairview, but I am not sure whether that was in there or not. It was to another school other than Roth, though.

THE COURT: Were these students black or white?

THE WITNESS: White.

THE COURT: You may proceed.

Q. In fact, there have been a number of medical certificates given for students who sought transfers for medical reasons, is that correct?

A. Yes, sir. Medical reasons would be a reason to authorize a transfer.

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A.A. TESTIMONY OF LORANA MADELINE DORSEY.

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[R. I. 2013, Vol. 20] Q. Was there a swimming pool?

A. Yes.

Q. When you were there, how many black students were there? Were there a lot or a few?

A. Not over 25, as I recall.

Q. All right. Were black students permitted to use the pool?

A. No.

Q. Was there a meeting between black students and the representatives of the school?

A. There was.

Q. And what was the purpose of the meeting?

A. To ask the reason why we weren't permitted to use the swimming pool. They would take it under consideration they said, but nothing came of it.

THE COURT: Mr. Lucas, I would like a date.

MR. LUCAS: Yes, sir.

BY MR. LUCAS:

Q. When did you graduate from Stele?

A. 1930.

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VIII. RELEVANT PARTS OF THE RECORD OF THE REMEDIAL HEARINGS HELD IN DISTRICT COURT IN FEBRUARY OF 1975 (R. II.).

A. TESTIMONY OF ROBERT O. GREER.

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[R. II. 156-157] Q. What advice did you give with respect to the subject first of just pairing of schools?

A. Our advice after consultation with regional specialists and others was that pairing in the city of Dayton would seem to be not appropriate at this time in 1975.

Q. And why is that?

A. You are quite familiar I am sure, Mr. Lucas, with the different enrollment patterns and enrollment fluctuations since 1968 and since 1971 and 1972. The Dayton School System has lost a little over 10,000 pupils, a little over 1,500 in the high school grades and the others in elementary. That is one complete high school. You could pull out of the other 7,500 several elementary schools.

When you look at this loss pattern and we looked at the proximity of buildings now existing, you would have to have close proximity of different types of buildings racially in order to make the kind of switch and pairing that is necessary.

Q. You are assuming only contiguous pairing; is that correct?

A. No. Do you want me to complete that?

THE COURT: Please continue.

THE WITNESS: It was our feeling that if pairing were done with contiguous kinds of pairing, that this, then, would require a number of boundary changes, a number of pairing changes within rather rapid periods of time. The turnover rates in most of the big cities including Dayton in pupil population is very rapid. You may find some classrooms that change completely during a grading period because of mobility of the population, black and white.

Therefore, it seemed unwise to us to advise at this time using a method that has not been working too well either in other systems during the last five years or in the city of Dayton based on the enrollment pattern.

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[R. II. 182-87] Q. Now, if I understood your earlier testimony correctly, you have indicated that in your opinion one of the problems with pairing and similar concepts in Dayton arises from the mobility of the Dayton population.

A. Right.

Q. With respect to mobility within the school system itself, could you explain to us what you mean?

A. This is what worried us when we listened to the various reports and went back over our mobility excuses over the past five years at least. I don't know whether people in big cities like Dayton move because of jobs or housing or because they are forced to move because of absentee landlords or what. That wasn't our purpose to find out, but in fact children and parents do move frequently in a city such as this and they are moving frequently here from one area to another, and as I said earlier, I think, to Mr. Lucas in response to one of his questions, you may have an entire room in a grade level change every six weeks.

Now, this is an awful thing for a teacher to face who doesn't understand all these varied kinds of people without staff development, and it is an awful thing to try to pin down enough to say let's pair this building with this building right across here and in a number of cases as you look at Dayton, you are going to be pairing an all black building with an all black building and that is not going to help anything or if you pair it with a building that may be all anglo in certain sections, you are pairing poverty with poverty and that doesn't answer any question.

It was our belief that the system should look at the methods which would bring together a multi-ethnic and multieconomic kind of grouping with their offerings or at least offer some

kind of method which would bring more of different kinds of people in different economic levels together so they could all learn about everybody's contributions without pairing poor and poor or black and black.

I don't know. Did I answer your question?

Q. Yes. I think you did.

You also discussed a different type of mobility which was mobility out of the school system itself, and could you explain for us what has been the pattern in Dayton and in similar communities with regard to that kind of mobility?

A. Well, in any system where you have over an extended period of time confrontation and lack of confidence and credibilty of the system, and in credibility of the system I don't mean to be derogatory about Dayton. This has happened in every big city in this country where people have lost confidence in State Departments of Education as well. They say none of us are doing anything. You can immediately start looking for the flight of people to the suburbs, the greener pastures, and at first we looked and we said okay, white is running. That was the common term, and we took a good hard look and we found out the affluent black was running too, and we were all running from the poor and from those who we considered less learned. We were running from the places where industry had decayed in a city. We were running from where jobs were different and we all seemed to want to find the place that was perfect for us on the fringes of a city.

First you moved to one edge of the city and then completely out of it and if you follow the pattern in Dayton, it is just like every other big place where this has gone on for a period of years.

Now, if the affluent whites move and the affluent blacks run either outside or to parochial schools or some other place, you have left a city of poverty and whatever. It can be black, it can be Appalachia, or anything else, any kind of mix, but you just have a poor city and a poor school system.

What we were trying hopefully to discuss with the School Board when we met with them and the Administration was

get your minds on building the kind of quality that will hold all the people in the system and then if you have got to build buildings to get them back together, then build a better rat trap and call the population back. You might as well do it as a school system because the businessmen are sitting out there waiting until the whole thing decays and they will buy it up and build up the most beautiful kind of city all over again and maybe the same folk that are in it won't even be there.

I apologize, Your Honor.

THE COURT: To the contrary Mr. Greer, in a problem that has complexities beyond my ability to understand, you have been very helpful.

You may proceed, Mr. Greer.

BY MR. GREER:

Q. Has the experience with certain types of desegregation plans including pairing techniques been to accelerate this movement out of the inner city process you have described?

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THE WITNESS: As I answered before, in specific instances, pairing just wouldn't work because of the types of youngsters and economic level of the areas and the fact that usually in inner city you will find a number of elementary schools have been built as the black population increased in the inner city. Another elementary school was stuck up to take care of the overload, so you had so many black schools until there is hardly anything to pair them with, and if you did pair across, it is with another elementary of poverty over here at the other racial level that happened to get stuck on the edge of that ghetto.

The poor are always there with us, and I don't care what color they are, cities have just stuck them in these situations, so the level and quality of educational offerings is not good for white or black.

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B. TESTIMONY OF GORDON FOSTER.

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[R. II. 199] Q. State your full name and occupation, please.

A. Gordon Foster. I am a professor at the University of Miami in Coral Gables, Florida.

MR. LUCAS: Doctor Foster's qualifications have already been tendered to the Court.

THE COURT: Yes.

BY MR. LUCAS:

Q. Doctor Foster, have you had an opportunity to examine Defendant's proposed plan of desegregation?

A. Yes, I have.

• • •

[R. II. 223-227] Q. Do you know what the approximate cost of the total magnet school program has proposed in the Board's plan was?

A. As I recollect, it was around three or four million dollars.

Q. I believe the record will speak on that.

Turning your attention to the other elementary magnet programs, can you identify them?

A. There were three magnet programs. One was modern foreign languages at Carlson which would include three blocks in a day in terms of timing with approximately 120 children in a block which would make a potential of 360 students. I believe this was intended to be held on opposite days or opposite schedule from the science business so that it wouldn't interefere with that.

There was a business education skills program at Huffman, and this was for grades 6, 7 and 8 which would encompass approximately 300 students, and the third program was at Kemp which was a career motivation center which was anticipated to interest approximately 220 students at the fourth

and fifth grade centers for two two-hour session a week. This is really very much like the current career opportunities programs that are being offered all over the country.

Q. All right. Is it your understanding that these are all part-time programs?

A. That's correct.

Q. And that the base enrollment in each school at Carlson and Huffman would remain the same?

A. That's correct, and the children would be transported in.

Q. Is it your understanding that these programs would use only the excess capacity at the respective buildings?

A. Yes.

Q. Have you examined the freedom of enrollment policies and the results of the freedom of enrollment and transfer policies in the plan?

A. Yes, I have.

Q. Can you describe those results?

A. Well, as I understand the plan, there were two basic plans that had to do with freedom of enrollment or open enrollment. One was called open enrollment which was for high schools only, and that was started just a year ago in January of 1974, and to the best of my knowledge, I found no reports of how many children moved for open enrollment in this program in a desegregated section. There were no numbers reported at all by race.

Q. Is that the one where they have an enrollment period prior to the opening of school?

A. I understand a child picks three choices, a first, second and third choice and he runs through a randomized process of some sort and if he doesn't get in that, why, then, he is assigned to his nearest high school, capacity being considered.

The freedom of enrollment is essentially what we call a majority-minority transfer program, and the figures for that are given in Exhibit A to the Board's plan. Well, it is really Exhibit B. The figures are 391 in the high school for the

1973-74 school year, and a total of 346 at the elementary and middle schools for that year. Those figures which add up to 737 coupled with carryovers from prior years of 613 and a second semester figure for 1973-74 of 258 give a total of 1,608 students in schools other than their neighborhood schools.

Q. How many of those were black children going to predominately white schools?

A. Well, I have a racial breakdown of receiving schools only for the one year of 1973-74, first semester. That was the 737 figure.

The way I read the data, all but nine of those would be black children going to white schools which I believe was your question.

Q. Viewing the entire desegregation proposal of the Board of Education proposal and the number of children affected by such a plan, do you have an opinion as to its effectiveness as a plan of desegregation?

A. Yes. My opinion is that basically it is a curriculum plan rather than a desegregation plan, that something like a total, a maximum of 6,400 part-time and full-time students could be affected by this plan, and many of those would only be in partially desegregated situations at best. Out of this approximately 6,400 maximum figure, about 3,000 would be what we might call full-time desegregated students. Those would be the ones at Stivers-Patterson Co-Op and Kiser and Miami Chapel Elementary School.

Secondly, there is no guarantee of the desegregative effect we all know of this program. I think some of the programs are likely to achieve some desegregation although minimal and some will maybe strike out.

Based on past experience in other systems, one would have to be somewhat less than optimistic about the total effect. I think we have mentioned the fact that in the schools where there is just a program such as at Roth, Dunbar, Huffman, Carlson and Kemp, desegregation is essentially not desegregation. It is just a group of kids coming in in an intact group.

Q. In a what?

A. It is a group of pupils being transported into those schools in an intact group, sometimes in smaller groups, but always staying apart from the rest of the school program.

• • •

[R. II. 2-8] Q. Doctor Foster, at the request of the Plaintiffs, have you prepared a desegregation proposal which has been submitted to the Court and to the Defendant School Board?

A. I have, yes.

• • •

[R. II. 231-233] Q. Did you have that as any sort of inflexible standard or was that a goal?

A. No. I think you will find in the estimates of the individual schools that some of them got a little bit outside that range. The object, in other words, was not to racially balance a system but to remove the racial identifiability of any individual school insofar as possible. There is quite a difference. The techniques as in most desegregation plans were to take the easier things first and see what that would do.

The way the demographic situation rests in Dayton, there are very few instances where you can redraw zone lines between contiguous schools and effect any degree of desegregation. The schools that are in the buff area between the white population and black population generally are already in a desegregated mix, and then when you get farther out from that center of desegregation, you run into a situation where you are contiguous no longer and at that point you need to consider pairing or clustering.

As was stated this morning or at least partially stated, clustering or grouping is an extension of pairing. Pairing is essentially two schools put together. A clustering or grouping can be two or more.

In a system that is approximately even in racial makeup,

pairing works very well if capacity is the same because you can pair one 50-45 per cent black school usually with a white school on the opposite side, only it would be like 90 per cent versus 90 per cent.

Where you run into clustering more than two schools, you usually do it because you have a differential in the capacity which necessitates putting more than two schools together to come out.

So, essentially, the plan developed a serious of elementary clusters. It left four schools the way they are and the original plan recommended we close three schools, and I have an amendment to that if we want to discuss that so that the plan would not involve any closing of elementary schools.

• • •

IX. RELEVANT PARTS OF THE RECORD OF THE REMEDIAL HEARING HELD IN DECEMBER OF 1975 AND JANUARY OF 1976 (R. III.).

A. TESTIMONY OF WILLIAM M. GORDON.

• • •

[R. III. 18] Q. Could you state your name, sir?

A. William M. Gordon.

Q. And what is your employment?

A. I am an Associate Professor of Education at Miami University.

Q. And what is your relationship to the plan which we have presented to this Court?

A. I directed the team that put the plan together.

• • •

[R. III. 45-46] Q. Would you consider it an adequate desegregation plan if all of the schools, the elementary schools

in Dayton which were presently identifiably black schools ended up with the 70 percent black or the higher percentage black and all of the formerly white schools ended up with the higher percentage white?

A. I would hate to see that considered as an implemented plan in the City of Dayton.

Q. Would you want to randomize the proportions?

A. Yes. I would say if that happened, that it would meet those parameters, and if those parameters were acceptable to the Court, I guess then that would be considered a desegregated school system. I don't think it is desirable.

Q. Would you consider that desegregation of the system?

A. No. I would much prefer to see the schools not identifiable, and I think if a school has been historically a white school and then just comes into the bare minimum figures, that it probably would still be perceived as a white school or a black school.

• • •

[R. III. 52] THE COURT: • • • That continued to move to the suburbs is not something that results from the desegregation order, is it?

That has been going on in Dayton for the last 20 years?

A. It was established today approximately 11,000 white youngsters and 900 black youngsters have left Dayton in the last five years.

Q. There has been a substantial out white migration in most urban centers; is that correct?

A. Yes.

Q. And that is without regard to desegregation; is that correct?

A. Yes, it has been going on. In some instances with desegregation and in some instances without.

• • •

[R. III. 61] Q. Am I correct that the open enrollment program does not result in substantial desegregation?

A. Well, we are in Court here now, so I would say yes, you are right.

Q. That is a conclusion at page 30 in your report, is it not?

A. Yes.

Q. Do you have figures indicating how many white students chose formerly black schools on open enrollment? Is that not set forth in the document?

A. Yes, it is in the document.

Q. Was it one, two or three?

A. It is a very small number. I think it was one. I am not sure.

• • •

[R. III. 71] Q. If that pattern reflected that all of the formerly black schools were one-third white and all the formerly white schools were two-thirds white, would that be a racial pattern in your opinion?

A. Yes.

• • •

[R. III. 282-285] MR. LUCAS: This is an offer of proof in connection with the testimony of Dr. Gordon. The Court has indicated that plaintiffs could not inquire of Dr. Gordon into the basis for the rejection of the concept of pairing and clustering of schools, and in particular insofar as it pertains to page two of the cover letter to the board transmitting the board's expert's plan.

That cover letter recited that the reason for not using pairing and clustering was because such pairing and clustering tended to cause white flight. Throughout the document marked Exhibit A on behalf of defendants, there are references to white flight and reasons why actual desegregation was not attempted using one of the major criteria under the Swan case.

Reference is frequently made to the articles by James Coleman, one of which is appended as an appendix to the plan, Exhibit A in this record.

If permitted to inquire by the Court, I would offer as Exhibit I to this offer of proof and this record an article appearing in the New York Times July 11, 1975 entitled "Coleman Concedes Views Exceed His Race Data."

In particular, I would have directed the witness's attention to the following paragraphs:

"In answer to questions, he said that his study did not deal with busing, and that his arguments applied to trends in only two or three southern cities.

"Some of the things I said went somewhat beyond the data," he said.

The New York Times article goes on to point out as follows: "However, a thorough check of all 20 cities – in which key officials in each were questioned by telephone – could find no court-ordered busing, rezoning or any other kind of coerced integration in any of the cities during the 1969-1970 period."

Newspaper articles are appended throughout Exhibit A, the proposal submitted to the Court by the board. Therefore, this article would have been offered in response.

I would also offer a document which I will mark Exhibit II, an article entitled "A Response to Professor James S. Coleman's Recent Research and Statements on Educational Desegregation Efforts" by Robert L. Green, Dean of College of Urban Development and Professor of Educational Psychology at Michigan State University, East Lansing, Michigan, and Thomas Pettigrew, Professor of Social Relations at Harvard University, Cambridge, Massachusetts.

I would have also offered an article appearing in, I believe, the American Association of School Research Journal, the exact title I cannot recall, an article titled "Reanalysis of Coleman's 'recent trends in school integration' " by Gregg Jackson of the U. S. Commission on Civil Rights. That would have been Exhibit III.

I would have also offered an article by Dr. Robert L. Green

entitled "On Professor James Coleman and busing – white flight" as Exhibit IV.

As additional support, I would have offered an article from the Dayton Daily News dated Sunday, December 7, 1975 written by Tom Teepen, editor for the Daily News editorial pages. This would be Exhibit V. Similar articles from local papers were offered by the defendants. This article is entitled "SOS Exaggerating 'White Flight' Menace Not Up To Its Billing".

I would have also offered in evidence an article from the Dayton Daily News dated December 8, 1975, page one, entitled "Dislikes busing, desegregation case puts Rubin on spot" byline article by Jonathan Miller indicating that the Court has expressed concern about some of the issues which could have been explored had the Court permitted me to examine the witness in full on this area. It is significant to note that the article indicates that the Judge of this court is concerned that a busing-based school desegregation plan "may so alienate white members of the community that short-term school desegregation may lead to long-term city segregation."

We do not represent that we know these to be the views of the District Court, but that these have been represented to the public at large as the views of the District Court. Of course, the witness's answers to questions might have led to other lines of inquiry which would have further exposed the reasons for their rejection of one of the Swan techniques tending to demonstrate their choice of a less effective alternative reflecting on two factors; number one, good faith and, number two, intent to segregate.

(End of proffer.)

• • •

B. TESTIMONY OF LARRY W. HUGHES.

• • •

[R. III. 111] Q. Dr. Hughes, did you agree with the statement of the report that appears on page 127 that says it has been found that the relative closeness of Dayton Schools makes long-haul transportation an issue in many cities moot here?

A. I generally agree with that statement. I think it makes it a less pressing matter.

• • •

[R. III. 141-142] [Q.] What I am concerned about is whether or not in desegregating elementary or secondary schools, you should end up with a pattern of schools where all the formerly black schools were 70 percent black and all the white schools were 70 percent white.

A. I don't think that would be good.

• • •

C. TESTIMONY OF JOHN B. MAXWELL.

• • •

[R. III. 200] Q. State your full name and your occupation, please.

A. John B. Maxwell, Superintendent of Schools in Dayton, Ohio.

• • •

[R. III. 202-204] Q. All right. Has the Board of Education adopted any plan for submission to this Court?

A. No.

Q. Has the Board of Education taken a vote on submission of a plan to this Court?

• • •

THE WITNESS: The Board voted 7-0 to submit the plan but not approve it.

Q. All right. Was there a vote taken on the adoption of the plan by the Board?

A. No.

Q. It was not a motion to adopt the plan, endorse it?

A. There was an amendment to the motion which was defeated.

Q. And the amendment was of what nature, sir?

A. The amendment was to approve the plan, and this amendment was turned down.

Q. And the vote was what?

A. 4 to 3.

Q. Did you make a recommendation to the Board as the chief school officer for the District as to whether or not it should approve this plan that has been submitted to the Court?

A. No, I didn't.

• • •

THE WITNESS: No, I did not.

Q. Has the Board taken any position with regard to some other plan which it would approve for submission to this Court?

A. No.

• • •

D. TESTIMONY OF GORDON FOSTER.

• • •

[R. III. 205] Q. State your full name and occupation, please.

A. Gordon Foster. I am a professor of educational administration at the University of Miami in Coral Gables, Florida.

Q. Dr. Foster, your qualifications have previously been furnished to the Court and you were qualified as an expert with the Court.

THE COURT: There is no question. Dr. Foster is an expert in this field, and I am pleased to hear from him.

• • •

[R. III. 230-232] THE COURT: Okay. So, if we have a school 33 percent black and 67 percent white, that is not racially identifiable?

THE WITNESS: No. I think what you are referring to is I was speaking about the high schools, if all the white schools come in at 33 percent black and all the black schools come in at 67 percent black or the formerly black schools and white schools, then I would hold they still maintain a racially identifiability rather than if they came in randomized.

THE COURT: Then, racial identifiability is not a function of percentage of students?

THE WITNESS: No.

THE COURT: But you just said that a school formerly —

THE WITNESS: Well, then let me say that it is not the sole function.

THE COURT: And you would draw a distinction between the 67/33 and the 36/64? The three percent would make a difference to you?

THE WITNESS: No, I wouldn't argue too much about that. The thing I would argue more about is, as I say, all the formerly white schools are still predominantly white.

THE COURT: Let's assume we turn it completely around. We will take all the white schools and make them 30 percent white and 70 percent black. What is your view of the racial identifiability there?

THE WITNESS: It would be a lot less than it would be previously, but I think a randomized assignment so that you don't have any relationship to what went on previously, any fixed relationship, is much better in terms of community perception about racially identifiable schools.

THE COURT: You may proceed, Mr. Lucas.

• • •

Q. Dr. Foster, is what you are saying that you cannot consider any school in isolation from the system in which it exists?

A. Yes. Well, that is one thing.

Q. Dr. Foster, are you familiar with efforts by some school boards to set up a pattern whereby the white schools remain whiter and the black schools remain blacker without reference to particular systems?

Is that something that school systems sometimes try to do?

A. Yes, sir.

Q. Does that protect usually the controlling white population or the white power in the School Board?

• • •

THE WITNESS: Quite often it does, yes.

• • •

[R. III. 249-251] THE WITNESS: As I remember in my response to you [the District Court], I said that that fact coupled with the situation that all the formerly white schools were in the 70 percent range and the formerly black schools the other way around — I am sorry — all the formerly white schools were at 30 percent black and the formerly black schools were at 70 percent black coupled with this difference in my opinion tended to make them racially identifiable.

THE COURT: You may proceed.

• • •

Q. As far as that type of thinking goes into racial identifiability, wouldn't it be true even if you filled Dunbar High School fully with white students, people in a few years are going to recall that as being a so-called black school?

A. As a school that used to be a black school.

Q. And the same thing would be true if you filled Belmont with entirely black students?

A. Yes, sir.

Q. But as far as your own definition of racial identifiability

is concerned, that is simply a situation where any school falls drastically outside plus or minus 15 percent from the mean percentage in the school district, isn't that correct?

A. Well, that is part of it. The other part is what we discussed earlier, and that is that you can't consider any one school in exclusion from the rest of the system. The biggest problem is if you have all formerly white schools still predominantly white in a system like Dayton that is about 50-50 and all formerly black schools are prodminantly black. Then, there are quite a few shades of lingering identifiability in my opinion is what I am saying.

Q. This is the third time you have testified in this litigation, is it not, Dr. Foster?

A. I think so.

Q. And do you recall testifying last spring in this case saying, "Well, I think in the final analysis, racial identifiability depends on the individual court's judgment, but my definition in a system that approaches 50 percent black and white would be any school that falls outside drastically plus or minus 15 percent from the mean at any given level."

A. That sounds reasonable that I so testified, yes, sir.

Q. And do you still feel that is a reasonable definition?

A. Yes, sir.

• • •

[R. III. 252] Q. Is it your feeling that in order for a plan of desegregation to be appropriate, there must be an approximate racial balance in every school in the system?

A. No, sir, not necessarily.

• • •

[R. III. 255-256] Q. Under your definition of racial identifiability, would it be fair to say that in the Dayton system if each school had a one-third to two-thirds proportion of either race, you would not consider the school to be racially identifiable?

A. That would depend on other circumstances also such as faculty assignment, the sort of situation that I described in option B of Dr. Gordon's plan. Numerically, you are right. I would consider those schools not to be racially identifiable, but when coupled with the sort of problem that has been described in option two of the high school plan, then I would have some doubt.

Q. If you get beyond simply numerical consideration of proportions so that you have a mixture of black and white students in a school, don't you get into situations that any school in a black neighborhood is going to have a certain type of perception or any school that has a certain name of past history is going to have a certain type perception?

A. It has not been my experience, no, sir, in desegregated systems. I think after a couple of years the public and the school people, the pupils, everybody tends to begin to perceive of schools as just schools and not as black schools or white schools.

• • •

X. RELEVANT PARTS OF THE RECORD OF FOUR VOLUMES TRANSCRIBED DURING THE REMAND HEARING HELD IN DISTRICT COURT IN NOVEMBER OF 1977 (R. IV.).

A. COURT AND COUNSEL COMMENTARY.

[R. IV. 13-17, Vol. 1] THE COURT: Mr. Greer, you did not. The thing that I took exception to was the notion that there was some agreement to which the plaintiffs were not party, and this article seemed to indicate that this might be an issue that you wanted to raise, and I simply wanted to foreclose the raising of that issue, namely a determination in your absence, and I say again there was no arrangement of any sort.

Now, if you have incorrectly interpreted the Court's order the opportunity for the plaintiffs to bring that to my attention has always been present.

MR. GREER: Certainly.

THE COURT: I'm simply not going to address myself to that question. I was raising this for a somewhat different purpose. I thank you, Mr. Greer, because frankly I had forgotten. There are proceedings in this case you gentlemen are more familiar with than I am. It's been a long time since this started. I sometimes feel I was a young man when it began, but it was a limited purpose that I raised this question at this time.

All right. One last observation, gentlemen, I am assuming that the representations made to me by the plaintiffs as to time, that I may rely upon it. I have set aside four days for this case, and I would ask only that it not be a recapitulation of the previous hearing held five years ago. I think the thrust of the inquiry is set forth by the Supreme Court. I am interested in specific instances.

I think, Mr. Lucas, that as I reread the record you and I differed on a distinction that I tried to draw between motive and intent, and I still adhere to my position. I think the

intent – evidence regarding intent is certainly admissible and I will welcome it. Evidence regarding motive, whether it was a motive of good purpose or bad purpose, really is not of significance to me. Let me give you a specific example, which I would say to you that I was somewhat troubled again by newspaper stories that the plaintiffs were prevented from presenting evidence of intent.

If, for example, it was a Board policy to have only black teachers teach black students, the intent of that may well be segregated in results. The argument by the plaintiffs that their motive in doing that was to give black students an inferior education as against the beneficent motive of the defendant who would assert, well, we were doing this because we felt that black teachers would provide an excellent example. I'm really not interested in either position. I am interested or might be interested in the fact of what was done and what segregative effect that it had.

Okay, with those preliminaries out of the way, gentlemen, Mr. Lucas, I will hear from you.

MR. LUCAS: Perhaps it might be helpful, your Honor, if I commented on your Honor's statement. I agree with the Court entirely that there is a difference between evil motive or motive of whatever nature and intentional action, and I think the Supreme Court in all of the cases has talked about the intent required as being an intentional doing of the act and a foreseeable consequences test.

However, I would suggest that the Court consider the question of the evil motive, since it has been specifically addressed by the United States Supreme Court in the Wright vs. City of Emporia, where Mr. Justice Stewart said the existence of an evil motive may aggravate and make more plain the nature of the constitutional violation and make the invidious nature of the discrimination more binding, more lasting, and required greater remedy. I don't have the specific page cite, but I would be happy to supply it to the Court. So I do think it is relevant.

I will be the first to concede, your Honor, that some of the

Court decisions seem to speak of intent in terms of a motive, particularly some of the lower court decisions, and in the same opinion they speak of it in the other sense that your Honor has used.

But I think there is a difference, and our position is that both are relevant, but for different purposes.

THE COURT: All right. You may call your first witness.

• • •

B. TESTIMONY OF DR. WAYNE CARLE.

[R. IV. 17-45, Vol. 1] Q. Would you state your full name and your occupation, please?

A. Wayne M. Carle, Professor of Educational Administration, Texas Southern University, Houston.

Q. How long have you held that position?

A. This is the third year.

Q. Dr. Carle, you testified previously in this case, and at that time you were Superintendent of Schools; is that correct?

A. That's correct.

Q. Since leaving the superintendency, can you tell us what positions you have held, and if you can give us a time frame, I don't think we need exact dates, but it would be helpful.

A. Yes, sir. From 1973 to 1975 I was Superintendent of Schools in Hammond, Indiana. And then assumed my present position at Texas Southern University.

• • •

Q. Dr. Carle, Plaintiffs' Exhibit 11-A is a letter addressed to you from the Department of Health, Education and Welfare.

A. Yes, it is.

THE COURT: Mr. Lucas, I'm not sure of the date. Is that 1969, March 17th?

MR. LUCAS: It's marked in the top right hand in pencil, March 17, 1969.

THE COURT: Yes, but my copy of it is difficult. Is it 1969?

MR. LUCAS: I believe so, yes.

Is that your recollection, Dr. Carle?

THE WITNESS: Yes, it is.

BY MR. LUCAS:

Q. Was this letter addressed to you in your official capacity as Superintendent of Schools?

A. Yes, it was.

Q. All right. Does it indicate that a copy was sent to the State Superintendent?

A. Yes, it does.

Q. Dr. Carle, the letter addresses several issues, and I would like to refer you, if I can, to the faculty issue, faculty and staff issue, that is addressed by the letter.

The determination of the agency was that the district pursues a policy of racially motivated assignment of teachers and other professional staff.

THE COURT: Mr. Lucas, excuse me just a minute. Again, if I interrupt from time to time to refresh my own recollection, I hope you will bear with me.

I have a recollection that Dr. Carle required a hiring of black teachers to the approximate percentage that black students bore at that time of the total, and insisted then that each school have a similar ratio. Is my memory correct?

MR. LUCAS: I think there was an agreement reached with HEW following this letter, your Honor, which resulted in a hiring policy being adopted.

THE COURT: All right.

MR. LUCAS: I will try to touch that briefly.

THE COURT: No problem, I'm just trying to recollect what I recall hearing. Go ahead.

BY MR. LUCAS:

Q. Prior to the receipt of this determination by HEW, had officials of HEW conducted an investigation into the faculty assignment policies of the district?

MR. GREER: I would object, your Honor. It seems to me that we are simply tracking over the same ground that we tracked five years ago.

THE COURT: I'm going to sustain the objection solely because I think that is within my understanding, Mr. Lucas.

MR. LUCAS: Your Honor, I think that we should address ourselves to this question in light of the Supreme Court's opinion about confusion on the part of everyone, at least as that quote sought, as to various legal principles and as to the various issues which need to be addressed. And I think that the Court's opinions, citations to various decisions dealing with the question of intent require us to speak to those issues of intent that are relevant in the record or to be supplemented directly to the record. I think it's a fair reading of the transcript with exhibit that at least there was some continuous misunderstanding, perhaps only counsel's fault, but as to what kind of intent was or was not relevant throughout the hearings.

THE COURT: Well, Mr. Lucas, I'm not objecting to your — I'm not sustaining Mr. Greer's objection as to the area that you wish to cover. I am sustaining on the basis of I see no point in repeating the testimony that is already before the Court.

I would assure you, Mr. Lucas, that a review of the transcript has been made of the hearing in 1972. I am sustaining the objection solely in the hope of saving time, and yet I find that our discussion is going to take up the time anyway.

Would you proceed, please?

MR. LUCAS: My purpose is simply to lay a predicate for asking a question.

THE COURT: All right. You may proceed.

Q. Dr. Carle, did you as superintendent direct your staff to furnish information to HEW as part of their inquiry into the faculty assignment policies?

A. Yes, I did.

Q. And did that also include professional staff?

A. Yes.

Q. Let me go backwards just a moment.

When did you assume your position with the Dayton Board of Education?

A. In 1968.

Q. In 1968 through the Dayton lawsuit did you have more than one occasion to conduct your own review of a variety of policies and practices of the district?

A. Yes.

Q. From an examination of the policies and practices that you found, as were operated during your superintendency, is the conclusion reached by the HEW as to the racially motivated assignment of teachers and professional staff a conclusion you can join in or disagree with?

• • •

A. Yes, I think the wording is accurately portrayed.

Q. I realize the wording is accurately portrayed, but does that portray an accurate reading of the facts as you understand them?

A. Yes. The wording I think that we are referring to is the racially motivated assignment of staff, I think that characterizes the situation as I found it.

Q. Is it your understanding, Dr. Carle, that the school system has the right to assign and reassign teachers on an annual basis?

A. Yes, it does.

Q. In making such assignments, were the assignments in the Dayton School District before you came and while you were there until the time of the agreement with HEW, were those assignments done on a racially motivated basis in whole or in part?

• • •

A. I understand your question to be, was the assignment of staff on a racially motivated basis totally discontinued, or words to that effect, and I am saying no, assignment was still racially identifiable and motivated on the basis of race.

THE COURT: Excuse me. In point of time, Dr. Carle, subsequent to the HEW letter or subsequent to what point?

THE WITNESS: I understood the question to be between the time of this letter and the time of the original suit.

THE COURT: Okay. And may I interpret your answer that that then terminated at a point or did it not terminate?

THE WITNESS: No, my answer intended to say that racially motivated assignment of staff continued to some extent throughout that period.

Q. You came onto to the superintendency in '68.

Was there racially motivated assignment of faculty and staff at that time?

A. Yes.

Q. And what was the date of the agreement with HEW; do you recall?

A. I don't recall the date, but it was within I think a year after the date of this letter.

Q. And did the racially motivated assignment of teachers continue during that period?

A. Yes.

Q. Dr. Carle, does the racial assignment of faculty and staff, racially motivated assignment of faculty and staff, have an effect on the schools themselves beyond the faculty?

MR. GREER: Objection.

THE COURT: Well, Mr. Lucas, I am mildly concerned over this line of testimony in view of my order of 1973 that I thought dealt with this. And I call your attention to the Subsection 3, "Maintain faculty assignment policies that will reflect in each school the approximate ratio of black to white faculty throughout the district. And then establish hiring policies that will enable the clerical and maintenance personnel hired by the School Board of Dayton to approximate the proportion of black to white ratio of the Dayton School District."

Now, this I think bears upon a critical question that troubles me, and let me share my concern with you. Do you view this as a condition precedent to punishment; that is, if the School Board conducted these activities, and for the moment I will concede – I will accept Dr. Carle's view that it was done and it was racially motivated, but if this Court's order directed

that that be terminated, that that specific area end, and again it was my impression that it was ended, even at the time of the hearing in 1972, is it your position that the Board having done that must be punished? Because clearly if the situation has not been corrected that's one thing. But if it has now been corrected, what the School Board did nine years ago would affect at the most now perhaps a third of the students in the system.

MR. LUCAS: Your Honor, three responses, if I may.

No. 1, we do not view desegregation as a punishment for anything. We view it as a benefit.

No. 2, it is my understanding of the defendants' position that there is no constitutional violation to be cured, that there was no constitutional violation to be cured, and that, therefore, any part of your Honor's orders should be dissolved, including, I would take it this part, and the case dismissed, that was their argument to the Court last time we were before the Court. With that context I don't think I can assume anything as implicit.

My third answer is that the defendants – the question I'm addressing right now with the withness has to do with whether or not the policy of faculty, racially motivated faculty assignment has effects other than the staff in the building itself. Whether or not it impacts on the identification of schools, impacts on parents, students, and so forth, and for what periods.

THE COURT: I recall again, Mr. Lucas, some testimony, some extensive testimony, on perception, community perception, that certain schools were perceived as black and certain were perceived as white, whether in fact they were or were not.

But I'm concerned with a little bit different view of this. I am concerned at this point with what his been done that requires correction by this Court. Because as I read the Supreme Court remand, that's what they are saying, I think.

And I agree with you, and I agree with – if there are aspects of this that are susceptible of correction, they must be corrected. But the fact that the community may perceive a

school as black, I don't know what I can do to change the community perception, if it being black in and of itself is not a constitutional violation. And I hope – I am trying to draw a distinction there that may be difficult to follow.

MR. LUCAS: I think I understand your Honor. And I think the point is, whether or not the identification, which may be an easier word than perception, arises out of a constitutional violation. If it does, this Court not only may, it must deal with the effects of the constitutional violation.

THE COURT: Surely you don't mean that I must order the community to stop identifying this school as a black school?

MR. LUCAS: No, sir.

THE COURT: Of course not.

MR. LUCAS: I am not suggesting the Court has mind control.

THE COURT: Hopefully not.

MR. LUCAS: I know Federal Judges have been accused of almost everything, but I don't believe I have heard of that.

THE COURT: Let's keep it that.

The question is how the school is viewed, or whether this, the actions of the Board, would have contributed to that view or identification is not the central question. It's just not the –

MR. LUCAS: In Swan the Supreme Court talked about the various things that school boards do to schools that tend to identify them as black or white schools. And one of the things they said was the assignment of faculty in a uniracial pattern or racially disproportionate pattern, that that tended to identify, and I will keep with the word identify since I think we are all more comfortable, identify that school in the community as a black school or white school.

I would refer the Court to another line of cases which deals with the question of how long after initial decree should the Court continue to have reports, or how long should the Board be under a decree.

And a number of cases, most of them frankly arising out of the Fifth Circuit, which had a great deal to do with that, have talked about the fact that you don't correct 100 years of

discrimination in two years of a plan or five years of a plan, that these things have to be looked at over a longer period of time.

THE COURT: Mr. Lucas, I'm not real sure that Swan travels very well, and I am of the view that this is implicit in the most recent Supreme Court decision.

You and I once had a discussion where you asked me the question do I assert that there are two different laws, one for the South and one for the North. And I don't assert that. But I suggest to you that the recommendation of the Sixth Circuit that this case be reexamined in light of Swan was specifically set aside by the Supreme Court, and I think for good reason. But be that as it may, I am still back to this basic question of we don't put the mark of Cain on a school board forever. We are here to determine whether or not there are incremental segregative actions that I can correct. And that, of course, is what you and I were just discussing, because there is a limit to what is doable even by a Federal Judge.

Well, we have gotten off the point, and I beg your pardon. Would you read the last question, please?

(The record was read by the reporter as follows:

"Question: Dr. Carle, does the racial assignment of faculty and staff, racially motivated assignment of faculty and staff, have an effect on the schools themselves beyond the faculty?")

THE COURT: You may respond.

A. Yes, it was one of the major factors that marks this school as being racially then viable.

Q. Does the pattern of racially motivated faculty and staff assignments impact on only a single school, or does it have effects on all the schools in the system?

• • •

A. No, there's a reciprocal effect of receiving or identifying any school within a school system as being racially separate. That then identifies the option schools as also being separate.

Q. Dr. Carle, let's assume that since – let's just pick a date – since 1940 there has been a pattern of deliberate, purposeful

racially motivated assignment of teachers and professional staff in a school system and that has continued until 1971. I want to ask you two questions based on that. Assuming, first of all, that you reassigned only the faculty in the direction of disestablishing this pattern, does that reassignment of faculty only eliminate the effects of the previous racially motivated faculty assignments?

• • •

A. No. I said that faculty assignment was a major factor, but it is only one factor. Any school that is identified as racially separate cannot be perceived as being desegregated if the student body is also segregated.

Q. All right. My second question based on the same set of facts is whether or not the reassignment of faculty and pupils can eliminate the effects of the dual structure of faculty assignment that existed from 1940 to, say, 1974 or '5?

• • •

A. In my judgment on the observation of the desegregation around the country, those two factors alone would not be sufficient. There would have to be a very major and continuing commitment on the part of the Board of Education to show to the community that the previous pattern was indeed disestablished and was intended to remain that way.

We have, for example, patterns of resegregation that have occurred where limited actions have been taken without fully disestablishing the previous pattern.

THE COURT: Mr. Lucas, hasn't the Supreme Court spoken on this? Haven't they indicated that resegregation is simply not a matter for the District Judge inquiring into?

MR. LUCAS: They said if it's not a product — in Pasadena, if it's not a product of the original violation, if it's something that occurs in the question of the original violation, and there are a variety of cases that speak to the incomplete status of whether or not the effects have been eradicated over a period of time, most of them arising out of the cases that raise the

question of how long should the Court continue supervision or when is the district entitled to be let out.

I might give you an analogy which some folks have used of voting rights acts where for a stated period of time the district is under the order until the effects of the previous discrimination has had time to dissipate. There it is not assumed that because one says tomorrow you are desegregated that going home will eliminate the hundred years of force that has headed one direction that has suddenly turned around.

THE COURT: The analogy, Mr. Lucas, I think runs head-on into Pasadena which can be read as substantially continuing the rights of the Federal Court to impose a trusteeship upon the school system.

MR. LUCAS: Well, no one is suggesting a trusteeship.

THE COURT: Well, in a sense you are. This does trouble me. It has ever since I read that case as to just what is the end product. As near as I can figure out the obligation of the District Court is to correct the situation, and that's it.

MR. LUCAS: Well, let me speak to what I hear as several questions, your Honor, asked several expressions. It seems to me that we have to keep separate at this hearing the question of whether or not the Court, having entered its order and the schools having changed their racial characteristics, that the Court need do more. That seems to me to be a Pasadena inquiry and a substantially different inquiry as to whether or not in the first instance there was a constitutional violation of a sufficient dimension to justify any particular court order, whatever scope that might end up being, and to evaluate whether or not there was a violation and whether or not its effects are still present in the district, we have to look at it as though the plan had not yet been implemented.

What I suggest is there is some feedback across the line in terms of what more the Court should do as opposed to what the Court should do in the first instance.

THE COURT: Well, I would suggest that what more the Court should do has got to be simply a tactical position, Mr.

Lucas, and is only confusing. There is no conceivable inquiry so far as I'm concerned, unless someone can demonstrate it to me, that there is before the Court any expansion of this Court's previous order regarding transportation of students or desegregation.

MR. LUCAS: Your Honor misunderstood me. I wasn't suggesting that there was an expansion of the order, but whether or not the order should remain in effect. This is the sentence I was using, whether the Court should do more.

THE COURT: I interpreted your statement then incorrectly, Mr. Lucas, and I hope I did misunderstand you.

MR. LUCAS: There is still an issue we will address with the Court's permission of whether or not one aspect of the order has been complied with, and I think that speaks to several issues, and I will take that up at the appropriate time.

THE COURT: All right.

MR. LUCAS: But my use of words simply dealt with whether or not the order should remain in place given a violation.

THE COURT: All right.

A. Mr. Lucas, I didn't mean to imply in my previous answer that time was the only other factor besides staff and pupil desegregation. I think the Board — or at least there is a statement that the Board intended to expand or to increase desegregation sometime in the past by expanding boundaries over three predominantly black schools, and that was eminently unsuccessful as my predecessor testified, precisely because of its limited nature. So there is also the matter of what schools are involved and how extensive the disestablishment is.

Q. Dr. Carle, as I understand it, your testimony is that the time that the change was in place and had some relation to how long the discrimination went on before, that it has to do with the nature of the remedy itself and the extensiveness of that remedy; is that a fair summary?

A. That's correct.

MR. GREER: I'll object to the summarization.

THE COURT: Overruled.

Q. All right. In 1969, in Plaintiffs' Exhibit 11-A, HEW indicated that there was a substantial dualability in terms of race, of color with respect to the distribution of pupils. Did it indicate both in this letter and in other correspondence that its investigation of that was continuing?

A. Yes, it did.

Q. All right. In the last paragraph of the first page there is a statement with respect to Roosevelt High School.

THE COURT: Isn't Roosevelt closed, Mr. Lucas? Am I confused, Mr. Greer?

MR. GREER: No, it is closed.

MR. LUCAS: Not at this time, your Honor.

THE COURT: I know, but, Mr. Lucas, problems of Roosevelt High School may be valuable for historical purposes, but in terms of what remedy, if any, is to be applied, I hardly think that it has any significance; does it?

MR. LUCAS: Your Honor, I think it has a great deal of significance because it has to do with the question of violation, which is directly related to remedy, and this is not, as I understand it, simply a remedy hearing.

THE COURT: It is essentially, Mr. Lucas. There is a predicate for remedy, you're correct, and that you are entitled to present, but somehow I looked upon this proceeding — I interpret the mandate as to take action prospectively if action is required, and I would suggest to you that Roosevelt High School in 1969 cannot under any circumstances have students in it in 1977 that are still there.

MR. LUCAS: Your Honor, I think the Supreme Court sent this case back to the lower courts for more specific findings on both the existing record and supplemental record that might be made.

THE COURT: Now, Mr. Lucas, excuse me. Not for more specific findings but a determination of whether or not there were other acts that had an incremental, I believe, segregated effect, and this is more than an abstraction, Mr. Lucas, and this is why I say that what occurred in Roose-

velt High School that is now closed strikes me as being somewhat less than significant. But again I will let you proceed.

MR. LUCAS: Well, I think perhaps it would be helpful if the Court understood what our position is. On page 12 of the opinion the Supreme Court says: "It is evident from the opinions both of the Court of Appeals and the District Court as to the applicable principles and appropriate relief," then referring to some confusion in various stages of the case, "the case must be remanded to the District Court for the making of more specific findings and, if necessary, the taking of additional evidence."

As we understood that – and I won't try to reread all of the sections of the opinion – that means specific findings about the record. The Court expressed – I won't question the Supreme Court's view of that. The Court in a number of places pointed out that it had not been given sufficiently specific findings on a variety of issues.

THE COURT: Would you address yourself to the bottom of page 13, and "It must determine how much incremental segregative effect these violations had." Now, whatever was wrong with Roosevelt High School, it has now been closed and the students that were there at the time of this letter I say again could not under any conceivable way still be there. The high school is a four-year high school, I believe.

Now, what I'm seeking to determine is let's assume that Roosevelt High School itself was a segregated high school. Assume that. The incremental effect of a non-existent school in 1977, I suggest to you, is of historical interest only.

MR. LUCAS: I would respectfully disagree because what happened to that high school, what effect there was from placing it there, what effect there was from the assignment policies, where the boundaries were drawn, what options there may have been speaks to what happens to students and why the demographic pattern is today what it is as opposed to what else it might have been. It also speaks very importantly to the question of intent.

THE COURT: You may proceed, Mr. Lucas.

MR. LUCAS: And that again affects all the issues, not just schools that are closed.

THE COURT: Let me ask you a question, if I may. Would you know, is there any member of the School Board today that was on the School Board in 1969?

MR. LUCAS: Yes.

THE COURT: How many?

MR. LUCAS: I know of one, and the others I would be guessing at. Leo Lucas is one.

THE COURT: It would be your opinion that the intent then is transferrable and along with the minutes of the Board and the prior actions attaches to the present Board?

MR. LUCAS: Yes, sir. I don't think a Board starts off every year with a brand new set of schools built in new locations. I think it inherits the past.

THE COURT: That may be very well, but they start out with a brand new set of members with their views and their ideas and the idea that they are charged with the prejudices perhaps or the biases or the errors of a previous school board –

MR. LUCAS: Well, it's not a personal indictment, your Honor. It's no more than saying a new judge of the court has some responsibility for the decision or the case load of the past.

THE COURT: Oh, indeed, but he is not chargeable with the motives or intent of his predecessors. He may be –

MR. LUCAS: But the motives and intents of his predecessor may have had something to do with the case load he inherits or the school buildings and the school assignments practices, and if we are measuring the effectiveness of the new Board members' disestablishment of the past segregation, that's another test.

THE COURT: Mr. Lucas, as long as we regard this prospectively and not retrospectively, I think we can come to an understanding because as I view that this is what the Supreme Court is saying. They are urging this Court to

make corrections if corrections are needed. I don't think they are asking this Court to become a philosopher as to the evils of what went on in the past. I may be incorrect in my view. You may proceed.

MR. LUCAS: We are not suggesting a philisophical approach, your Honor.

THE COURT: I'm delighted to hear that.

BY MR. LUCAS:

Q. Referring to Roosevelt High School, Doctor, did HEW advise the system of its determination with respect to that school?

• • •

A. Following this letter?

Q. No, in this letter.

A. Yes, they did.

Q. What was that determination?

A. That the students of Roosevelt High School are not afforded the same educational opportunities as other students in the system.

• • •

[R. IV. 91-92 Vol. 1] A. No. The communication indicates that these recommendations were ignored and that, in fact, the reorganization with respect to middle schools did include racially segregated and in schools that could become—that is, both currently and schools that could become more racially segregated.

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Q. Dr. Carle, I'm going to direct your attention to plaintiffs' Exhibit 106. Plaintiffs' Exhibit 106 lists Dayton Public Schools' racial composition when new schools open. It lists the high schools and elementary, date opened, date of additions, pupil ratio, percent whites, faculty ratio, percent white. Would you agree, Dr. Carle, that a school board opens a school deliberately and purposely?

A. Yes, it does.

Q. And when school boards build additions they do so with intentions and purpose; do they not?

A. Yes, they do.

Q. And when they assign faculty to schools, they do so intentionally and purposefully; do they not?

A. Yes.

Q. The faculty assignments that you see here, did they indicate the percentage white or black?

A. Yes, they do.

Q. And does the data on this chart also indicate pupil percentages?

A. Yes, they do.

THE COURT: Mr. Lucas, let me ask you a question. Do you have a comparable document that would show the number of tenured teachers in the school system on that date broken down by dates?

MR. LUCAS: I don't know if such a document exists, your Honor.

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[R. IV. 100-102, Vol. 1]

Q. From an examination of Plaintiffs' Exhibit 106, do you have a view as to whether or not this type of assignment pattern that's exhibited here of pupils and faculty would be the result of accident or inadvertence?

• • •

A. Mr. Lucas, for some five or six years I was an assistant superintendent for personnel, so I became very familiar with employment and assignment practices under the Ohio law. And it is – there is among the profession misunderstanding about the difference between assignment and placement of – or employment and placement of teachers.

This table deals only with the placement or assignment to a school. The contract with the Board of Education employs a teacher for a school district, not for a particular school. Therefore, a teacher has no right under the law to assignment to a particular school building and may be moved. And I would give this caveat, that in recent years there have been certain employee master contracts that would affect that, but that was not true of most of the years reflected on this chart.

THE COURT: I don't think your answer is responsive, Dr. Carle. Would you read the question again, please?

A. So the question is do these reflect racial assignment at the time the schools opened or additions were made, and almost entirely they do reflect that.

• • •

Q. Dr. Carle, from an examination of Plaintiffs' Exhibit 106, particularly the pupil assignments and faculty assignments at the time of opening, do you have a view as to whether or not that pattern, if any, could have resulted from inadvertence, accident or chance?

A. I see no way it could be chance. It would have to be by intent.

Q. Dr. Carle, you made a statement that you were assistant superintendent of personnel.

Can you identify where?

A. In Akron, Ohio.

Q. And you held a position with the State Board of Education; did you not?

A. Yes, as assistant state superintendent of public instruction.

Q. And in that position you worked with school districts all over the state?

A. Yes.

• • •

[R. IV. 130-131, Vol. 1] Q. Dr. Carle, why did you not go ahead and implement the plan which was prepared by you, prepared for the Board by Dr. Foster after the adoption of the resolution? Did you feel that you had the authority to do that as superintendent?

A. The specific authority given to me, of course, was rescinded. The superintendent under Ohio law does have responsibility for assignment of pupils and faculty. So to a limited extent perhaps a superintendent could proceed, but the fact of the matter is the kind of plan that was envisioned here involved all aspects of the schools; that is, the development of proper curriculum, the preparation of faculty as well as the reassignment of students, and under Ohio law a school board has control of the policies and the budget. It would have been, if not impossible, faulty on my part to proceed without the support that was needed to make a desegregation plan effective.

Q. Dr. Carle, is there any – let me back up and have a preliminary question. Was the plan prepared by Dr. Foster and adopted by you educationally sound and feasible?

A. It was both educationally sound and feasible, yes.

Q. Is there any reason, Dr. Carle, except for the action by the Board reestablishing boundaries and cancelling the actions taken by the previous Board, why that plan was not implemented as the plan itself called for the following September?

A. No. If the Board had not acted in rescinding it the students would have been reassigned under the plan effective September of 1972.

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[R. IV. 139-142, Vol. 1] Q. Now, as a matter of fact, did you not respond to this letter of January 22, 1970 by the letter that is marked as Plaintiffs' Exhibit D or was marked as such some five years ago?

A. Yes.

Q. And in that letter you pointed out that the transfers of 34 black students and 36 white students were done for the individual good of those students and to avoid interruption in their continuity of instruction; is that right?

A. Yes, sir.

Q. And in fact you pointed out in that letter to HEW that these transfers that were based on those kinds of individual considerations did not render Roth 100 percent black; isn't that right?

A. That could very well be, but I can't –

Q. In fact, a total of 18 white students remained at Roth; isn't that right?

A. I assume that that is there, but I – could you direct me to the paragraph?

Q. The paragraph will be the third indented paragraph on the first page of your letter of February 20?

A. Okay.

Q. And that information that you provided to HEW to tell them that they were wrong when they sent you the previous letter with accurate information; wasn't it?

A. This letter we are referring to? As far as I know that is correct, Mr. Greer.

Q. Let me call your attention – I realize a long time has passed – to the last paragraph of your letter of February 20, 1970, first the second to the last paragraph. You indicated to HEW that these were special transfers, emergency situations because of explicit educational reasons, and that you would – the intent was to reassign all of these students to their school attendance areas beginning the September of '70 semester in the absence of explicit educational reasons to the contrary.

A. Yes.

Q. And in investigating that old situation as you indicated in this letter, you found that there were sound educational reasons for these central transfers; didn't you?

A. Yes, sir.

Q. In fact, in the last paragraph of this letter you state – and I'll quote this because I want to ask a question about it.

"I appreciate your concern about forces in actions that contribute to increased racial isolation. I regret, however, that neither your office nor other federal agencies, including the Department of Justice, that were invited to observe last fall found it expedient to express concern at that time or to lend direct assistance to reduce a racial polarity and separatist pressures." I take it you felt somewhat strongly when you responded to HEW's contentions that were made in Plaintiffs' Exhibit 11-C?

A. Yes, sir, I did.

Q. And in fact you were endeavoring as strongly as you could to reduce racial isolation wherever possible; weren't you?

A. No. We were responding to situations caused by racial isolation that were virtually impossible to deal with and very frustrating, and it seems that almost everyone has an opinion or a complaint about that, as a matter of fact resolving is very, very difficult and results in very strong pressures.

Q. Can you recall testifying on this exact identical subject five years ago?

A. I recall that this topic was raised, yes. I think by you perhaps.

Q. And in fact as you testified then, these special transfer situations were justified and that the safety of students and their continuity of their education had to be placed on a high list of considerations; isn't that right?

A. It's precisely that kind of frustration, Mr. Greer, that led me to conclude that piecemeal and token efforts dealing with crisis situations were not satisfactory to resolve a matter of longstanding racial isolation in segregation, that this

simply leaves us in a frustrating and impossible situation to operate schools.

Q. And it's that frustration you expressed in the last sentence of your letter, Plaintiffs' Exhibit 11-D; isn't it?

A. Yes.

• • •

[R. IV 144-145, Vol. 1] Q. Isn't that true?

A. I think so, yes.

Q. And you have touched today upon the subject of optional attendance zones, and you testified on that subject five years ago; didn't you?

A. I think perhaps tangentially, I don't recall extensively, but that could be so. I do recall there was some reference to maps at that time, yes.

Q. Can you state for the Court any optional attendance zone in the City — in the whole school district of Dayton that in April of 1972 when this suit was filed gave an option to students in that zone that increased racial isolation in one of the two schools affected by that zone? Any example.

A. I think the review of optional zones indicated that a number of optional zones still existed where there was — where the change had taken place sometime before.

However, there was indication that particularly in the Dayton view area, there was recent evidence of assignment — that is of enrollments between schools such as Roosevelt and Colonel White, Colonel White and Kiser that were racially identifiable, Mr. Greer.

Q. So that the examples you would cite would be the Colonel White-Kiser and Colonel White-Roosevelt?

A. Your question was existing in 1972?

Q. When this suit was filed.

A. I'm saying that I recall those examples, I don't know that those would be the only ones operative at that time, but there still were optional areas that existed, and I could not testify as to the moment as to whether they then involved any elections, because I think that some of them had existed for some number of years.

Q. My specific question was as to examples of optional zones that in April of 1972 gave the students living in those optional areas a chance to attend one of two schools in a manner that increased racial isolation. And you have given me two examples. Is it your testimony that, for example, the Roosevelt-Colonel White optional zone as it existed when this lawsuit was filed increased racial isolation or diminished racial isolation of the schools affected, or do you know?

A. Given only that school year, if that's the intent of your question, I would not want to venture an opinion at this point.

• • •

[R. IV. 149 Vol. 1] Q. And as I understand it, if there are racially identifiable schools in a school system, the only way that you can resolve that problem, regardless of how we characterize the problem, is by taking the system as a whole; isn't that true?

A. Yes.

Q. In other words, if you try to — if you have a situation where one school is predominantly composed of black students and is identified thereby as a black school, the only way that you can really eradicte that is on a system-wide approach?

A. No, I indicated to Judge Rubin that the mere existence of a predomonantly (sic) black school does not necessarily indicate a segregated system. • • •

• • •

[R. IV 151-176, Vol. 1] Q. All right. Let's explore your system-wide view with respect to something that you testified about this morning.

When you talked about the need of looking to the entire school district in areas of racial isolation or of segregation,

you cited an example where, and I think I am quoting you correctly, at an early date the school board in Dayton attempted to increase integration in part of the system.

Do you recall that?

A. Yes.

Q. And what you were referring to was the 1952 so-called west side reorganization; isn't that right?

A. Yes, sir.

Q. And the intent of that board action was to achieve greater integration in the student body; was it not?

A. There was a statement by the former superintendent to that effect, yes.

Q. And the idea was that by expanding and making this reorganization more students in the Dayton system would have an opportunity to be in racially mixed situations; isn't that correct?

A. I don't know that was inherent in the statement at the time, but I would not argue that that could be what was in mind.

Q. And in fact as you have testified before, as far back as 1967 you had pointed out this action of the Board as being a positive effort of the Board toward integration, isn't that true?

A. That was not referred to today, but I think previously there was a statement in 1968 that referred to it, yes.

Q. All right. I might refer the Court to Joint Exhibit 1, which was the 1967 expression of your opinion in that regard.

A. Mr. Greer, could I just correct that? I was not in Dayton in 1967. You may be referring to a resolution that was adopted by the Board of Education in 1967 prior to my arrival there.

Q. I'm sorry. But, at any rate, you have expressed that opinion before today, both in the prior trial and in prior statements as superintendent of the schools with regard to that 1952; haven't you?

A. That limited action in a segregated system is often doomed to failure?

Q. Or in a racially isolated system or segregation or whatever words you want to use.

The specific thing I am referring to is your statement that the intent of the Board as expressed in that action was a positive effort toward integration, whether it subsequently was frustrated or not.

A. Yes. But the signal that is sent is here is another group of black schools about to be identified. Had the opposite action been taken, namely white students being transferred into the black schools, I suspect an entirely different signal might have been sent at that time, and that might have been an alternative that would have led to something different than what we have inherited.

Q. At any rate, as we know, the Board's intentions in that reorganization in 1952 were frustrated and more and more schools became black; isn't that correct?

A. That's the result of that action, yes.

Q. And it's your —

THE COURT: Excuse me, before you leave that, Mr. Greer asked you if the Board was frustrated. Now, you agreed with that?

THE WITNESS: I agreed with the result he indicated. I don't know that the Board was frustrated one way or another. I do recall that a deposition was taken from Mr. French indicating that the outcome of that effort was that the schools -- the next area of schools became all black. I don't remember his characterizing it as a frustration or any other — anything other than it didn't work.

THE COURT: I understand. The problem that you and I have, Dr. Carle, is you think frequently I am asking a question that I am not.

What I am concerned with is do you consider that the action of the Board was done with the intent of it failing, or did it fail despite their good intentions?

THE WITNESS: I think it's absolutely impossible to characterize which direction the intent was.

I think that the action was an intended action, and whether or not the Board intended for a permanently less segregated system to evolve, the fact is that it didn't. So that obviously is not a workable solution.

I'm not sure that they ever went back and said, okay, can we put white students back in the schools and will that work better. I don't think there was any kind of — I'm not aware that they consciously then tried to do anything else.

Therefore, I can't characterize the original intent other than that as Mr. French said they moved the boundaries, which did include some black students in formerly predominantly white schools.

THE COURT: You are aware, of course, that my inquiry was to be as to segregated intent.

Now, an experiment that fails may be evidence of segregated intent if it was foreseeable that it would fail or conversely it may be evidence of integrative intent and that the, if I can use the term, technology of the times simply didn't understand the totality of what occurred.

Is it your opinion that it was foreseeable at that time that this would fail?

THE WITNESS: I am sure that it was foreseeable that the schools that were then all black would remain all black. I cannot read the Board's mind as to whether or not it foresaw what the change of boundaries toward the all white schools — or the predominantly white schools would result in those schools.

But I doubt that there was any doubt in their minds that the schools that were involved in this change would remain at least half all black.

THE COURT: You may proceed, Mr. Greer.

BY MR. GREER:

Q. Let's move from that example back to the theory that you have been discussing with us today on the necessity of looking to the entire system.

I take it one reason you used this example was that while the expressed intent and the immediate effect of the Board's action in '52 was to increase integration in part of the school, the schools later became black, and in order to do something effective to avoid that you have to do the entire system; isn't that right?

A. With respect to that period of time, again you can't operate part of the system on a segregated basis without signalling that the rest of the system is on a segregated basis. And I don't think — I think that signal was clear at that time as it has been since.

Q. And what happened in that instance was that, in your opinion, because they didn't cover the entire system and make a situation in every school where you had a rough approximation of the black-white balance of students throughout this system, the immediate effect of reducing racial isolation was frustrated by population movements away from those schools; isn't that right?

A. That's not correct in my judgment, in that you assume there is nothing in between involving every school and taking some action that's appropriate to the situation.

The action that was taken there was that nothing was done to eliminate the segregation that already existed in the three schools whose boundaries were changed. Therefore, nothing was, in terms of the Board's overall policy, was communicated to the community.

Let's suppose, for example, that the Board said we have found something very much of a problem in our system, particularly let's say they said it in 1955 after Brown. We note that we do have racially segregated schools. Therefore, it is henceforth our policy that there shall be no more segregation, and we are hereby changing the presently segregated schools to whatever would be necessary to desegregate them, and that we intend to operate no segregated schools in the future.

If that were communicated to the community, I suspect it might have a much different effect than minor boundary changes involving schools that remain all black.

Q. Well, let's look at the boundaries and the evidence in this case has demonstrated, of course, that for a period of 20 years before this suit was filed there were no appreciable changes in the boundaries of the various schools in the Dayton School District; isn't that right?

A. That's my understanding, yes.

Q. And, therefore, if one of those school attendance areas was white or mixed at one time and later became black, it became black because of population movement; did it not?

A. I think from what we know about population movement today that is not a proper characterization. I think there's ample experience in Dayton to know that the location of schools, the policy of the School Board and the assignments of staff, the racially segregated history of the district all reinforced whatever may have happened in housing. So I would not identify housing as the single factor that may have changed the boundaries — or changed the characteristics of a given school.

THE COURT: Excuse me just a moment. Dr. Carle, are you suggesting some form of affirmative action was required by the Board?

THE WITNESS: I suggested that there were alternatives to having racially identifiable schools.

THE COURT: Okay. But I'm impressed with this statistic or this statement that I do have a recollection of, but, frankly, not a very vivid one. If the Board does nothing, if they establish boundaries and for 20 years they were not materially changed, and if in that period of time certain schools became black, then as near as I can tell the Board's doing nothing must be evidence of segregative intent or you must take the position that they were under a duty to do something affirmatively. Now, am I correct in my analysis of your testimony?

THE WITNESS: I think that —

MR. LUCAS: Your Honor, I would like to object because I don't think that that reflects —

THE COURT: Frankly, Mr. Lucas, I don't think this is open to objection. The purpose of this hearing, I believe, is to educate me, and I will confess my need of it. And if I wish to interrogate your witness as to questions that trouble me I'm not going to entertain an objection. You may note it for the record.

Could you answer that, Dr. Carle?

THE WITNESS: Yes. The reason I am pausing has to do with affirmative action. I'm not sure that's the only course open is what I'm saying.

THE COURT: The concept of affirmative action.

THE WITNESS: What I would like to emphasize is that — and I'm sure that we are all aware that societal pressures like a train running on a track tend to be undiverted unless something intercedes. I think for many years it was evident what the public policies were, whether they be characterized as walking schools or whatever, were leading to in American education and in the cities. Particularly after Brown it became painfully aware of what was happening.

Now, if there was merit to Brown, and I certainly think there was great merit to Brown, then it certainly was evident after 1954 or 1955 to school boards what the impact of continuing the present policies, whatever they were, was. In that context, yes, I think thinking persons, decent persons, law-abiding persons have an obligation to review their policies no matter how benign they may appear simply because those policies somehow have led to the situation.

THE COURT: So it would be your opinion that a Board that does nothing, allows boundary lines to remain by doing nothing commits a segregative act?

THE WITNESS: Yes, I would have to say that certainly in a judgmental basis in the fact that the Board has before it so many options, and it clearly knows that it has the authority to do something different, and if it doesn't do it I think its intent must be to maintain what, therefore, this

is, and a policy which is in place is just as active a policy as one that is newly adopted.

THE COURT: You may continue.

BY MR. GREER:

Q. Let me follow up on this same line, Dr. Carle, with what I think follows from it. As I understand your views in this area on responsibilities of affirmative action, wouldn't it be correct to say at least from your viewpoint on the subject of racial isolation that every decision that a school board makes where there is racial isolation for any reason somewhere in the community — every decision a school board makes, except a decision to have some degree of racial balance in all the schools in the system, becomes by definition a racially segregative decision?

A. No, I don't think that's the thrust of my views to this point, but the effect of — the cumulative effect of policies can indeed lead to that and did lead to that in Dayton, and unless that's interceded in some manner that corrects the segregation then indeed almost everything that is done does have effect on it. It does have cumulative effect.

Q. Let's just take a hypothetical situation of a community that has no school system at all but all the blacks live on this side of the river and all the whites live somewhere else and a school system appears on the horizon. Am I not correct that unless there is some racial balance merely to impose a grid on that system and send kids to school to get an education is not enough because you're going to just mirror the isolation that exists in the community, and that in that hypothetical situation every action or inaction that the group controlling those decisions makes is a racially segregative decision because if they open a white school you know it's going to ultimately — or it's going to be identified as a racially identifiable school. If they open a black school it's identified as a racially identifiable school. If they open a mixed school it's going to become racially identifiable because of the population movement where that's possible to do.

A. Well, that's a long hypothetical.

Q. I'm sorry that it's long. It's the end of a long day.

THE COURT: That's not only a long hypothetical but excellent testimony by you, Mr. Greer, although I will regard it. Would you respond, Doctor?

A. I should like to respond to it in this fashion. I don't think it's necessary to go to hypotheticals. I think we have a situation before us in Dayton which is very concrete. I don't think that — I'm not aware of any city in this country in which anyone came upon it and found an existing city in which someone had magically created people and houses, and there were no forces or no policies or no laws or no economic factors that brought it to that point. Therefore, I think you have to deal with it in the context of how the situation did develop and then do whatever has to be undone to achieve a unitary system. Dayton was not a unitary system.

Q. Dr. Carle, you are obviously historically correct. The Northwest Ordinance so provided. But what I am concerned with is the placing then of schools located, for example, one mile apart, that in and of itself in your opinion is an act of segregation if that results in identifiably black schools and identifiably white schools?

THE WITNESS: If that is the foreseeable result, yes.

THE COURT: Okay. You may proceed.

BY MR. GREER:

Q. I'm not real sure that I got an answer to my hypothetical question. Wouldn't it be true that in that hypothetical situation by your definition, your philosophy or view of this subject, any action becomes by definition a racially segregative action?

A. Even in that extreme hypothetical situation, which I don't believe could exist in any city, it is conceivable that an action could contribute to the segregation of schools, but

I would not say – I would not characterize any action. You have described to me a totally benign – I think you have attempted to tell me about a totally benign situation.

Q. Now, I said any action except a decision that would affect the entire school district. So that if you had a situation where you had plus or minus 15 percent ratios on every school, that would resolve the problem obviously?

A. No, I have not, I think, at any point said that every action has to affect every school in the system. I said, however, that any action could affect every school, and it has to be examined in that light.

• • •

Q. I'm not asking you what you suspect. I'm asking you if you know of any city in the United States of America where there has been a racial balance of students throughout the system that has taken place except where there has been a court order or some other kind of order imposed from above on the system, and I would leave out, if you please, systems where there is only one school in the city.

A. Well, the moment I name any location you'll argue that there is some reason why it doesn't fit your definition, but there are certainly cities such as Berkley, California, or Evanston, Illinois who on their own took action to desegregate their schools. Whether effectively or ineffectively they did such action without imposition of the Court order.

Q. Before perhaps I didn't make myself clear. In Evanston and in Berkley you have situations where the imposition of the district-wide racial balance was done by order of the School Board; isn't that true?

A. Yes. I thought you asked me was there a place where a court order or some such – I was just giving you an illustration where a school board had done it.

THE COURT: Dr. Carle –

THE WITNESS: Am I misunderstanding the question?

THE COURT: I think you are, and I'm very interested in this because I think this is essential. Assuming a choice,

and assuming a lack of fiat by anybody, are there places where there is racial balance that you can advise me of?

THE WITNESS: And by racial balance you mean substantially every school has –

THE COURT: Yes.

THE WITNESS: – a balance?

THE COURT: Reflects the percentage of the total district.

THE WITNESS: Examples I might use, your Honor, may be based on old information. I go to Harrisburg, Pennsylvania, for example, which instituted a policy of assigning students by computor to the district and only in the district and only in the school, and at least from reports of several years ago this resulted in representation in each of the schools.

I am not aware – I have no reason to say in four or five years to know whether that has held at that, but I've given you examples of smaller communities in which there did not occur the kinds of patterns in large cities. I've given you examples of where school boards acted on their own. I've given you an example of another kind of plan, and I still am not sure I've answered your question.

Q. Well, let me see. I think maybe you have. I think we're about at the end of it. But if we subtract from what you told us the example where a Court has imposed a plan and then again subtract from what you told us the example of a small town which only has one school and no place to move to except in the neighboring community and subtract again those situations and only the ones that I know of are Berkley, California, and I confess I didn't know of Evanston, Illinois until today, where the School Board has imposed something of the order of the resolutions of December 19, 1971, you can't give us any examples; can you?

A. Well, I thought I gave you quite a few examples. But now what category am I still missing, one in which from your point of view there has occurred without any of the kinds of illustrations I've given you racial balance in every

school? I suspect that where that exists we haven't heard much about it because there hasn't been a suit and there hasn't been an issue raised, but I'm not willing to concede there are no places where people don't live together in some more harmony than has been indicated in this case.

Q. I'm not asking you to concede anything. You may believe in the Loch Ness Monster as far as I know. You personally have never seen one; isn't that fair enough to say?

A. I would say that of the cities I know of, yes.

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Q. If we take the Dayton situation, we've talked about the 1952 actions of the Board. In 1959 Roth High School opened with attendance boundaries that caused the initial flow of students there to be 75 percent one race and 25 percent of another; did they not?

A. Yes.

Q. And that was 75 percent white and 25 percent black; wasn't it?

A. That's my recollection.

Q. And that school became completely black; did it not?

A. Yes, it did, with the exception we noted previously, 34 and 18 students that existed, I think, in 1972.

Q. And the only alternative to that action whereby the design of the thing had opened up as a racially mixed school apparently intended by the Board as such would have been to racially balance all of the students in the high schools, wouldn't it, to avoid that event from occurring?

A. No, no, that would not have been the only —

Q. You could have adopted a high school zone plan of the type that we have today, I take it?

A. That might be an alternative. I think someone told me today that the Board was considering building a building that's been discussed for some years on the Miami River, so that would be a central location that would draw from

a variety of areas. There were certainly alternatives to a building at that point.

Q. If we look to the alternatives that the Board had before it in 1959 when it by intent opened up a high school with boundaries that made it a mixed school but reflected the race throughout the school system, the alternative to doing it that way and having that grand opening frustrated by the time passage and movement of people were, one, to scrap all the high schools in the city and build a big high school in the middle; two, to have some sort of random selection process so there would be a balance of students at the high school level in the existing buildings throughout the city or, three, to adopt some kind of pairing system such as we have now where you move students across town so that there will be a balance of students in the various high schools; isn't that true?

A. Oh, another possibility would have been, say, we admit high schools are operated as segregated schools and we are now closing a segregated school and relocating the building wherever, and whites and blacks will go to it together. We no longer are going to maintain separate schools.

THE COURT: Dr. Carle, I'm disturbed over this. How would Roth have been perceived in 1959 as a white or black high school?

THE WITNESS: With the substantial black minority —

THE COURT: Excuse me. Isn't it the other way? Wasn't it 75 white at the time of opening?

THE WITNESS: Yes. With the substantial black minority located in the area immediately adjacent to the black segregated Dunbar High School and in the context of what happened in all the previous actions of the Board, it would have to be perceived as the next black high school which indeed it became.

THE COURT: I see. So the ratio of students would not be significant?

THE WITNESS: Not in light of the conditions that existed at the time.

THE COURT: Well, now, Doctor, if this is possible, don't view it from 1977 because that's easy.

THE WITNESS: I understand.

THE COURT: It's very simple to point out all the errors. Upper courts have been doing that to me in this case for five years after the fact. But I'm concerned in 1959. How would that have been perceived?

THE WITNESS: I think it had to be perceived in exactly the same way Mr. French characterized the earlier fifties action on the elementary schools. Here is another racially changing area. We're putting a school there. That's going to be the next –

THE COURT: Racially changing area and the Board puts a school there.

THE WITNESS: With a substantial minority.

THE COURT: Draws the boundary lines in a fashion that there are 75 percent white students and does nothing further, and in your opinion the fact that that became 100 percent black was foreseeable and was a segregative act; is that right?

THE WITNESS: Yes, in light of what just happened a few years before. The pattern is repetitive.

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Q. Let me just ask a few more questions in the same area and then we'll be done for the afternoon, Dr. Carle.

You, or course, were not in the Dayton area in 1959 or in 1952; were you?

A. No, sir.

Q. You first arrived here in '68, I think you've told us?

A. Yes.

Q. Another example of this same kind of thing would be when the Board built Jefferson Primary School the year before you came here. You are aware that there was a conscious intent to place that so that there would not be an increase in racial isolation, but an increase in the schools serving a racially mixed student population?

A. Mr. Greer, my recollection is that there was great controversy over where a school might be located. It was located in an area that was racially changing, and I think even at that time foreseeable to become black.

Q. But the alternative locations that were discussed were locations that would have separted the white student population from the black student population in that school; isn't that right?

A. I can't recollect at the moment. I think that was discussed in the trial, that there was more than one side, but I think either side was foreseeably to the black.

Q. But the immediate effect or at least the intent expressed and what occurred was to add this school – at a location where it would serve a racially mixed student population instead of separating the mix of those races into two separate school sites, one predominantly white and one predominantly black; isn't that so?

A. I wish I could remember seeing a document to that effect. I wouldn't deny that was discussed. I'm sure there was great concern in the Dayton community at that time. I know there was great controversy in the community about that very issue. Whether or not that was the solution that was the one that would do what you say, I'm not certain.

Q. But again as with Roth in '55 and the elementary schools in 1952, because of the failure to adopt a system-wide approach to solving the problems of racial isolation, the racial mix that was achieved by the initial action dissolved through passage of time and movement of people; correct?

A. That's correct.

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[R. IV 243, Vol 2] Q. Dr. Carle, yesterday afternoon you discussed the period of time leading up to the adoption of the Board's three resolutions on December 19th of 1971. Do you recall that?

A. Yes.

Q. And from your description during that period the Board was receiving a variety of suggestions, opinions, recommendations and directives on the subject of racial imbalance from a variety of sources; is that correct?

A. That's correct.

Q. And indeed you've described the period as one of turmoil and pressure, especially from HEW and from black activist groups; is that right?

A. Surely.

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[R. IV. 244, Vol. 2] Q. It is correct, is it not, Dr. Carle, there was an election to the Board in November of 1971?

A. Yes, sir, it is.

[R. IV. 245-251, Vol. 2] Q. There was turmoil and pressure there as well as turmoil and pressure from HEW and black activist groups, I guess it would be fair to say?

A. Surely, and other groups.

Q. And it was known at the time that the election returns came in in early November, 1971 that the philosophy of the Board majority was going to be reversed as of the start of January of 1972; isn't that true?

A. Well, there certainly was speculation as to what an election would mean. There was, I think, no — nothing to predict what the Board might do as a board.

Q. All right. But the candidates who were elected and who became the majority members of the Board had campaigned on preserving the neighborhood school concept approach; hadn't they?

A. No, sir. Two of the persons elected were not of that background.

Q. The effect of the election was to make a Board majority that had come out strongly in favor of the neighborhood school approach; true?

A. That was one of the terms that they used, yes.

Q. Now, you've indicated that as far as December 19th resolutions were concerned that were drafted by you following this election that you did discuss those in advance with the Board's executive committee as it existed at that time?

A. Yes.

Q. And I take it that included Leo Lucas, who was the President of the Board at the time?

A. No, I'm sorry. I used the term executive committee, which means my executive committee as chief administrator. These were my administrators.

Q. And am I correct that the only Board member or potential Board member with whom you discussed the resolutions was Leo Lucas, who was then the Board President?

A. Leo Lucas asked that it be drafted, and I believe I recall talking mostly to Mr. Lucas. I won't say that no other Board member talked with me, but that's my recollection. It was primarily Mr. Lucas until such time as the resolutions were transmitted to the Board as a whole.

Q. Do you recall having any conversations with any Board member other than Leo Lucas prior to that transmission?

A. I can recall shortly before the resolutions were transmitted to the Board that Mr. Goodwin, who was — Let's see. I was going to say who had been elected to the Board. I have forgotten the circumstances, but at any rate there was a request for information about the resolution, it seems to me, on the day that they were being circulated. I think any answer, if it was Mr. Goodwin or Mr. Ridenour, or whoever may have asked, was that as soon as the copies were ready for or were duplicated for transmission that it would be sent to all Board members concurrently, and that was done.

Q. This would be December 18th or 19th.

A. No, it would be earlier than that; wouldn't it? Wasn't it the first week of December?

Q. Well, if the resolutions, I believe, were enacted or adopted on December the 19th of 1971?

A. I don't have that date before me, but it would be the week of whatever that Board meeting was.

Q. I'm sorry. The date was December 8 of 1971. So I've misled you.

A. Yes.

Q. But it would be approximately that time?

A. Yes.

Q. Just prior to that time and indeed on December 6, 1971 you and Leo Lucas had reviewed the proposed resolutions with Louis Lucas, the plaintiffs' attorney in this litigation, is that true?

A. I believe I stated that Louis Lucas joined briefly my executive committee meeting, and we were discussing the resolutions at that time and did ask Mr. Lucas questions at that time. I think on the same day Mr. Lucas – both Mr. Lucases were together, and so my answer I think is yes to your question. I just didn't want to indicate that there was any discussion at that meeting – I don't think that meeting involved Mr. Leo Lucas is all I'm saying.

THE COURT: Dr. Carle, is there not by statute or I presume statute legal counsel for the School Board?

THE WITNESS: The School Board in Ohio is permitted to have legal counsel. The statutory counsel for a school board is the county –

THE COURT: Prosecuting attorney?

THE WITNESS: Prosecuting attorney. However, most larger cities do not avail themselves because both of the time demands and because the attorney himself not having time. So there were two counsel to the Board at that time, as I recall.

THE COURT: And Mr. Louis Lucas was counsel to the Board?

THE WITNESS: No. Mr. Louis Lucas I testified had been in the city. Leo Lucas called and said that he would be available if we wanted to ask him any questions.

THE COURT: Isn't that a bit unusual to consult professionally an attorney who is not charged with the representation of the Board?

THE WITNESS: Oh, by all means, no. We weren't consulting him as an attorney. We had virtually every month or so been consulting with people who were involved with desegregation and/or legal aspects of desegregation around the country, and this was just one more opportunity to expose myself to a person who had a good deal of experience in the field.

THE COURT: You saw no impropriety in –

THE WITNESS: No. It was before a group of eight or ten people. No, I saw no impropriety. It was rather customary for us to try to share and fully review any information we got from any source.

MR. LUCAS: Your Honor, I might direct your Honor's attention to the earlier trial. This same discussion was had and your Honor made certain comments.

THE COURT: This continues to disturb me. I had forgotten I mentioned it, Mr. Lucas, but I have certain views as to the obligations and the legal representation of public bodies, and it does not include in my opinion the discussion with non-representing attorneys, and if I mentioned this, then I presume my concern is still the same.

MR. LUCAS: No, your Honor, your concern at the last hearing was that you saw no reason for it to be a problem, and you saw no relevance as to who was consulted or why. I can direct the Court's attention–

THE COURT: I guess I've grown older in the ensuing five years, but it doesn't bother me, not enough to make it worthwhile to discuss any further. You may proceed.

BY MR. GREER:

Q. Indeed, before the drafting of these resolutions you had been involved in discussions concerning the filing of a lawsuit of the type in which we're presently involved; isn't that right, Dr. Carle?

A. No, that's not correct.

Q. That's not correct? The resolutions of December 8, 1971 were on the books for a matter of a month; isn't that right?

A. That's approximately correct, yes.

Q. They were rescinded as soon as the new Board members who have been elected in November of '71 took office in January?

A. Yes.

Q. And according to Plaintiffs' Exhibit 8 the date of that action was January the 8th of '72; correct?

A. That sounds correct, yes.

Q. That was some nine months before the elimination of attendance districts and attainment of a balance, not only of racial composition but also of family income characteristics was to become effective in each building in the school system; isn't that true?

A. Yes. The plan which I approved was to go into effect with the immediately next ensuing school year. We were at that point in the middle really of a school year.

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[R. IV. 256, Vol. 2] Q. Well, without quibbling with you over whether you interpret or misinterpret the language here, it is a fact, is it not, that this resolution, as well as the other December 8th resolutions, were rescinded by the Board nine months before the stated effective date for rescission of attendance districts?

A. Yes. It is my understanding that that rescission was taken before the effective date of student movement.

Q. And no students in the Dayton School System were ever transported or moved or attended different schools under the December 8th resolutions; did they?

A. That's correct.

Q. Now, you talked to us yesterday morning about identifiability of schools.

Do you recall that?

A. Yes, I do.

Q. And as I understand, in your view a school becomes racially identifiable when the racial mix of the student body in that school becomes perceptibly different from the racial mix in the district as a whole; it that correct?

A. No, I do not recall testifying to that effect.

Q. Well, what makes a school racially identifiable.

[R. IV. 265-267, Vol. 2] Q. Let me refer to Defendants' Exhibit AU. This is an exhibit that was placed in evidence some five years ago in this case and represents Negro enrollments and faculty, 1951-'52, indicating that the black enrollment in the Dayton School System at that time was 6,628 students out of approximately 34,600, which would be about 19 percent of the system; wouldn't it?

A. Yes.

Q. And it indicates that of those black students approximately half were attending schools that had — or four schools that had a 100 percent black enrollment?

A. Yes.

Q. And approximately half were attending schools with mixed enrollments?

A. Yes.

Q. Now, it's now 25 years I guess that have elapsed since these figures. The percentage of black student population in the Dayton School System has risen from 19 percent to 54 percent; hasn't it?

A. Yes.

Q. And I think you confirmed yesterday that for the past — or for the past 20 years prior to the filing of this suit or for the past 25 years there was no real change of significance in attendance boundaries; correct?

A. I didn't dispute that general characterization.

Q. Now, if we look at these — these schools that were mixed schools in 1951 and 1952, Roosevelt at that time was 31.5 percent black; wasn't it?

A. Yes, it was.

Q. And to the extent that that was identifiable as a black school it would be because of the student composition, because the faculty was entirely white?

A. Yes.

Q. And if we look at Adams School, that was 29.3 percent black at that time; is that right?

A. Yes.

Q. And to the extent that would be perceived as a black school, it would be as a result of the student composition since the faculty was entirely white?

A. That's correct.

Q. And the same would be true of Central School, which was 33.9 percent black in student population?

A. Yes.

Q. And the same would be true of Drexel, which was 28.9?

A. Yes.

Q. Or Edison, which was 43 percent black and had an all-white faculty?

A. Yes.

Q. Or Irving, which was 46.6 percent black and had an all-white faculty?

A. Yes.

Q. Or Jackson, which was 35.9 percent black in student composition and had an all-white faculty?

A. Yes.

Q. Or indeed Weaver, which at that time was 67.6 percent black in student composition and had an all-white faculty?

A. And had reached the perceived tipping point on the part of the Board's and administration's policies and, therefore, it was now considered to be black, so black teachers were now being introduced to it. So it's the only mixed school having more than half black students and some black teachers.

Q. It had four percent of its faculty that was black?

A. That's correct.

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[R. IV 269, Vol. 2] Q. But you would agree with me, would you not, that if we go back to Defendants' Exhibit AU and take the example of Edison, that that school, if it were perceived as either a black or white school would be perceived as a black school with 43 percent of the student body black?

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A. I think it could be so perceived, yes.

Q. And, of course, you weren't here in 1951 or 1952, that's why you don't know whether it was perceived as such?

A. I was not here in those years, that's correct.

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[R. IV 272-275, Vol. 2] Q. All right. So I understand from that if every school in the Dayton system had been 97 or 98 percent black in student population, none of them would be perceived as black schools?

A. I think that it's fair to say that they would be perceived that way. I objected to answering on the basis of the reason. I don't think that is the only reason.

Q. But if we look then at Exhibit AN, in 1963 and 1969 there were 36 white and 68 black teachers at Roosevelt; weren't there?

A. Yes.

Q. And in 1969 and 1970, there were 44 white and 64 black teachers at Roosevelt?

A. Yes.

Q. And in 1970 and '71 there were 44 white and 65 black teachers at Roosevelt; right?

A. You probably have moved to the next table, right?

Q. It's the same exhibit, a couple of pages over.

A. Okay.

Q. And in 1971 and '72 there were 48 white and 32 black teachers at Roosevelt; were there not?

A. Yes.

Q. Whether or not assignment of teachers is relevant to racial identifiability of schools, let's look at Dayton at the time this suit was filed in April of 1972.

Am I not correct that on December 19th of 1969 the school board adopted resolutions stating that the staff throughout the entire Dayton School District would have a racial composition reflecting the total staff of the District as a whole?

A. That's correct.

Q. And indeed by December 19th of 1969 every teaching staff in the District was integrated to some extent?

A. To some extent.

Q. And since the adoption of that resolution on December 19, 1969, up to the time of the filing of this suit, the integration of the staff on this system-wide ratio basis remained in effect; isn't that right?

A. Yes. From '71 through the filing of the suit, is that what you are asking me?

Q. Right.

A. Yes. But did you say the assignment of the staff or the –

Q. The placement of the staff as the result of the resolution that was adopted in December of 1969 ended up with a faculty in every school in the district that was a rough approximation of the racial balance of the district as a whole; right?

A. No. I would characterize it that way in that an examination of the table we have just been looking at, for example, indicates that in '72-'73 the range of faculty assignments in the high school was from as little as 23 percent black to as much as 50 percent black.

Q. All right. So while it wasn't an exact numerical copy

of the ratio in the district as a whole, it was a balance plus or minus that ratio; wasn't it?

A. Yes. But of even more significance to me was that the 23 percent ratio was for Belmont High School, then a substantially white school, with Dunbar having the 50 percent black staff ratio, and Dunbar, of course, was 100 percent black school. So that the direction of the previous discrimination had not been totally altered and, of course, was still reinforced by the racial enrollments of the schools.

Q. Dr. Carle, while that may be significant to you, am I not correct that a number of the community looking at a school sees the color of the children that are attending that school, but in all likelihood isn't going to know the exact number of staff in that school or how many of them are white or how many of them are black?

A. Well, I'm tempted to be facetious, and I'll submerge that, but people see a lot of things in schools, Mr. Greer. I don't think that that's a relevant way to characterize these assignments. I'm not concerned – I don't think that casual observation is the only basis on which you classify or deal with this very serious problem.

THE COURT: Gentlemen, I had intended as a matter of procedure to allow presentation and cross-examination as wide as you wish. I am fast returning then to the position that I took in 1972. This perfection of schools is a very slippery concept. I've never understood by whom it is perceived or what the standards of perception are, but I have the decided feeling that you gentlemen are conducting the same disagreement that you had five years ago, and I strongly doubt that either of you is going to convince the other. Now, unless we have something new I would like to leave the area of perception of schools • • •

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[R. IV 278-285, Vol. 2] Q. Dr. Carle, is this a determination made by the Office of Education, Office of Civil Rights?

A. Yes. This was not a communication from, for example, the field investigators or the persons who composed the teams that came to us from the director, in this case the acting director of the Office for Civil Rights, the chief officer of that.

Q. And there are elaborate appeal procedures just as there are in the Federal Courts to appeal from a decision of the agency to the administrative process; is that correct?

A. Yes, that is so.

Q. Now, the Dayton Board in response to this document achieved a delay in the faculty reassignment by electing not to appeal; did it not?

A. That's correct, after a good deal of negotiation it was possible to –

Q. And actually you got a two-year period from 1969 to come into compliance; is that correct?

A. That is correct.

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Q. Dr. Carle, are you aware from your examination of the records that the Board for the first time assigned black faculty to these schools at the time these changes were made?

A. Yes, I am aware of it.

Q. Are you aware, Doctor, that optional attendance areas were created with respect to certain of those schools in the white areas of the zones?

A. Yes, I am aware of that.

THE COURT: Mr. Lucas, you are not again assisting. Would you identify this by dates? When are you talking about?

MR. LUCAS: Since 1952, 1954 period, your Honor, and I'm referring to the contraction of the boundaries of Garfield and McFarlane, the assignment of black children to the Jackson, Weaver, Edison and Irving Schools, and the creation of optional attendance areas in Jackson and Edison.

THE COURT: In the same period of time?

MR. LUCAS: Yes. That's in the period described – I believe it's summarized in Dr. Foster's testimony of what he

called the Westside Reorganization. And that was the area to which the cross-examination was addressed yesterday.

Have I sufficiently identified it for your Honor?

THE COURT: Indeed. You've also convinced me of the somewhat limited utility, Mr. Lucas. The events of 25 years ago, I suspect, would not affect any student in school at the moment and might not even have affected his parents.

MR. LUCAS: It might well affect the racial identifiability of the school if it's still around, your Honor.

THE COURT: It might affect the racial identifiability 25 years ago, but I would point out what I pointed out before, that concept of racial identifiability, Mr. Lucas, is elusive, and I don't think you need spend a great deal of time making it less so. You haven't succeeded to this point. Let's go forward, please.

MR. LUCAS: Your Honor, with all due respect for the Court –

THE COURT: Mr. Lucas, could you do me the favor of proceeding with your interrogation?

MR. LUCAS: All right. Is it permissible for me to continue the examination on that area?

THE COURT: Indeed, Mr. Lucas, you may proceed as you see fit.

MR. LUCAS: I wanted to make sure I wasn't transgressing from what you said.

THE COURT: I haven't ruled on any objection that might be made to your question. I'm merely pointing out to you –

MR. LUCAS: Your viewpoint.

THE COURT: I think your continuing – First of all, Mr. Lucas, I think these matters were discussed in quite some detail yesterday. I don't think you add much, but I'm not going to stop. You go forward.

BY MR. LUCAS:

Q. Again for the record, your Honor, I believe the question I had onboard, Dr. Carle, was whether or not you are

aware of the creation of optional attendance areas in connection with certain of those schools in white portions of the zone?

A. Yes.

Q. In light of those two factors, Dr. Carle, do you have a view as to the intention of the Board insofar as whether or not there was an intention to establish these as the next black schools in Dayton?

MR. GREER: Objection, your Honor.

THE COURT: When did you arrive here, Dr. Carle?

THE WITNESS: 1968, your Honor.

THE COURT: Sustained.

MR. LUCAS: I would make an offer of proof to the Court, your Honor. The witness has testified that he reviewed the books and records and the facts in this system and in connection with that he was required under the rules of the Court to answer certain questions on the requests of admissions, and that he made a further review at that time, and I think his answer is relevant.

THE COURT: You may proceed.

MR. LUCAS: May I have his answer as an offer of proof, your Honor?

THE COURT: You may proceed, Mr. Lucas. You've made your offer of proof. Would you ask your next question?

MR. LUCAS: Your Honor, I made no offer —

THE COURT: Mr. Lucas, I have sustained an objection now. Now, you ask your next question.

MR. LUCAS: Your Honor, I have not yet made an offer of proof as to what he will say.

THE COURT: You may get that offer of proof if you elect to, but I sustained the objection.

MR. LUCAS: Your Honor, I think the rule permits the offer of proof, if the Court wishes.

THE COURT: If you wish to do this out of the presence of the Court I have no objection. You may expand the record as you see fit.

MR. LUCAS: My problem, your Honor, is that I don't want my representation of his answer. I would rather have his answer.

THE COURT: I have sustained the objection. I would ask you to ask your next question, and you feel free to put anything in the record that you wish.

MR. LUCAS: I will through the witness rather than my representation.

THE COURT: Feel free, but not in the presence of the Court. Let's go forward.

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[R. IV 287-288, Vol 2] Q. Dr. Carle, if you will accept the amendment from little or no to no significant, I believe that was the substance of the question asked you or several questions in that regard. Do you recall that, Doctor?

A. Yes, I do.

Q. Thank you. Now, Doctor, does the factor of school construction involve boundary determinations?

A. Yes, it does.

Q. And are you aware of whether or not there were schools and school additions made in Dayton from the period 1954 to 1972?

A. Yes, there was an extensive construction program in that period.

Q. And are you aware of the pattern of faculty assignment during that period of time?

A. Yes, I am.

Q. Dr. Carle, from your examination of the records of the Board, including the construction and additions and the racial compositions of the school, were you aware that 22 of the 24 new schools constructed between 1950 and the present, 22 of them opened and 90 percent were black or white?

A. Yes.

Q. Does the establishment of a school unit as an ad-

dition or portable or what have you to an existing school site – does that speak to the boundaries in terms of the effect on boundary change or decision not to change with regard to such construction?

A. It speaks with great weight, Mr. Lucas, and I heard – in not thinking of that phase of boundary development I took a question of the context of older areas of the city.

Q. Dr. Carle, you've mentioned in your testimony on my examination that the minority Board members' plan, which was the plan submitted after the trial and the decision of the Court, and you mentioned that that was discussed with plaintiffs. Now, was that discussed with plaintiffs as to the substance, or was it discussed with the minority Board members?

A. It was discussed with the minority Board members, Mr. Lucas. I have had occasion to look at my testimony from yesterday and note that I took your questions in that series to be that you were asking about the minority Board members. I think you used the word plaintiffs. It was late in the afternoon, and I wasn't listening very • • •

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[R. IV. 304-305, Vol 2] THE COURT: But that would be more the exception than the rule apparently? Selection of a site and construction of a school is a relatively short process; is it not?

THE WITNESS: Well, I confess that I have never compared the date of acquisitions versus the dates of construction in Dayton as such, but I'm simply saying I think both patterns could be evident, that maybe a site was selected and purchased over, let's say, a period of two or three years versus one that might have been set aside for 10 or 12 or more years.

THE COURT: Would you feel that such things as the future of National Cash Register or the future of our defense posture as it relates to the Air Force or the future of

the construction industry are reasonably foreseeable events to either a superintendent of a school or the Board of Education?

THE WITNESS: I think in all of the instances you have cited there are considerably unknowns, political decisions, for example, on the part of government, economic situations. I recall a rather rapid change in the electronics versus mechanical computation thing.

THE COURT: Precisely. And this rather unrelated event has an effect upon Dayton; does it not?

THE WITNESS: Sure, indeed.

THE COURT: Then we can agree that a superintendent and a school board really are using their best guessing – guesstimates, perhaps, are they not, because no one is able to analyze the possibilities of something that might occur in the future, and yet based upon that structures are being built that will be used for at least one generation? Now, would you agree with me that this is a very difficult task?

THE WITNESS: Oh, I certainly would agree with you that it is.

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C. TESTIMONY OF JOHN TREACY.

[R. IV. 180-214, Vol. 2] Q. Could you state your name and address, sir?

A. My name is John J. Treacy. T-r-e-a-c-y.

Q. And what is your employment?

A. I am a Professor of Economics at Wright State University and director of the Center for Business and Economic Research.

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Q. Dr. Treacy, did you at the request of Mr. Krebs and myself make a study of certain optional zones in the Dayton school system?

A. I did.

Q. What questions did you address in your study?

A. I was asked to essentially look at two items. The first was did the high school option zone set up by the Dayton School Board affect the racial composition of the high schools with such zones and hence the racial balance of the school system as of 1972. And then I was also asked to look at were the option zones used as a means of segregation as the racial composition of the attendance zones changed.

Q. Four optional zones were specifically mentioned in the Court's original decision in this case, Westwood - Jackson, Fairview - Roth, Roosevelt - Colonel White and Kiser-Colonel White. Did you include all four of those zones in your study?

A. Yes.

Q. And what methodology did you employ in studying these optional zones?

A. I used the United States 1970 Census data, the third count, which is the smallest unit of analysis that the Census Bureau presents data. This is by city block in urban areas. And the methodology that I used was to first take the option zones as defined by the Dayton School System. This involved some map work, and I created a map overlay and then defined the attendance zones in terms of Census geography blocks.

After doing that I constructed a series of logical statements in a computer program which would then take the data and aggregate it by the relative school attendance zone. In effect then what I did was really aggregate the Census block data into respective attendance zones.

Q. All right. After you had transformed this Census block data, can you tell us what Census you used?

A. The 1970 Census on housing and population.

Q. Were there any other Censuses taken of the areas in question prior to the time of this lawsuit in 1972?

A. Yes. Well, the Census is taken every 10 years. However, the ability to manipulate the data on computer tapes is a relatively recent innovation in the sense that previous to

1960 the Census figure was available only in published form and it is very tedious if you're going to try to deal with all the blocks. For example, there's 2,800 some odd blocks within the City of Dayton, and if you're trying to, you know, manipulate that data by hand it becomes very, very tedious.

Q. So what you did was take the 1970 Census data from that computer?

A. Yes, in computer tape form. In other words, the data exists as a computer tape as well as in published form.

Q. Now, once you went through this technique of taking the Census blocks that could be fit into the optional zones, that were in question here, and tabulate all that information in the computer, did you prepare tables summarizing the findings that you made?

A. I did.

Q. And we have marked those tables as Defendants' Exhibit DA in this action.

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Q. Let's start with Table 1 of that exhibit, Dr. Treacy, and can you tell us what that table is and explain each column to us?

A. Table 1 deals with the racial composition of enrollment in the Dayton School District. The reason I looked at this first was in order to determine the degree of racial imbalance. I wanted to look at the racial composition of the school system as a whole, and I also wanted to write the data out in terms of high school attendance. I created a machine-readable file on the data for this as well. This data was originally taken from the exhibits that were put before the U. S. Supreme Court, I guess, in Brinkman vs. the Dayton School Board.

Q. Did this Table 1 involve any Census data or computer work?

A. No. This was data supplied by the school district to the Court in the previous hearing.

Going down the table, of course, the first column simply gives the year for the data. The enrollment for all schools

is in the second column. Blacks enrolled in all schools is the figure in the third column. The percentage of blacks in the school system is in the fourth column. The high school enrollment is in the fifth column. The number of blacks in high school is in the sixth column, and the percentage of blacks in high school was in the seventh column.

Q. And again what was the significance of this table in connection with your study?

A. Well, it showed that the percentage of blacks as in the school population was increasing steady over time from slightly over 31 percent in 1963 up to almost 50 percent in 1975. It also for the purposes of my study pointed out that there was some significant difference between the overall percentages of blacks in the high school. There tended to be fewer black students in high school. This was probably the result of the fact that black families in the City of Dayton tended to be younger than white families. So that in a sense the black families had youngsters that were in lower grades.

It might also reflect, of course, different retention rates as well in the school. However, by 1970 the discrepancy between the racial balance in the school system as a whole and the racial balance in the high school is relatively small. It was only about a four percent difference.

Q. Now, if we could turn to Table 2, could you explain that table to us?

THE COURT: Before you leave this may I ask a question? A quick examination indicates that the ratio or that the difference has steadily decreased over this period of time; am I correct?

THE WITNESS: Excuse me. I didn't hear your question, sir.

THE COURT: Well, all right. It appears that the difference between the total number of blacks in the system and blacks in the high school has steadily decreased, that in 1963 it was at the order of some six-plus percent. In 1975

it is at the order of 1.4 percent. Do you find any significance to that?

THE WITNESS: This simply, I guess – the result of this is the increasing percentage of blacks in the Dayton City population and hence this school district.

THE COURT: No, you don't understand what I'm saying. There is a difference, a significant difference that you just mentioned before between the number of blacks in all schools and the number of blacks in high school. In 1963 I suggest that it's something over six percent.

THE WITNESS: Yes.

THE COURT: In 1975 it's at the order of 1.4 percent. In your opinion, and perhaps I'm premature in asking this question, but I would also point out that this Court's order abolishing optional zones occurred sometime in between those two points.

THE WITNESS: Yes, sir.

THE COURT: Does that have any significance?

THE WITNESS: No.

THE COURT: You may proceed.

BY MR. GREER:

Q. I take it from what you have told us as far as the change in those ratios is concerned, as the younger black families with younger children would grow up, those children would end up in high school; isn't that right?

A. Yes.

Q. Now, if we go to Table 2 can you tell us what that table is, how it was composed and then go through it column by column so that we'll understand it?

A. Table 2 represents the population of the Colonel White High School attendance zones. I used the word plural there in 1970 because I broke the population in the attendance zones into two components. One was the basic zone; that is, where the students that lived in that zone were directed towards Colonel White alone and then there were two other zones that were included.

One was the option zone with Roosevelt High School where the population that was living in this area had the option of sending their children either to Colonel White or to Roosevelt High School, and the third component was the option zone with Kiser High School, where the population living in that area had the option of sending their children either to Colonel White High School or to Kiser High School.

Q. All right. Now, the first column you have marked is headed Code. What does that mean?

A. The code was simply the variable that I created in the computer, and the logical statements assigned the code two blocks on the basis of the logical statements that I had issued in the program. So that the code statement I guess is more of interest to myself rather than perhaps to any of the readers in this court.

Q. It's simply something that would key you back to your data?

A. Yes. This in effect was the variable that the computer used to aggregate the data.

Q. All right. And do you have your printout data with you today?

A. Yes.

Q. Now, Column 2 is headed Total Population.

I assume that simply means the total population in each of these three zones, the two optional areas and the basic zone?

A. Yes, this represents the U.S. 1970 count of population that existed within each of these areas.

Q. Now, is that an estimate or is that by actual count of the blocks in the areas?

A. No, this is the U.S. 1970 census population count. It is not an estimate.

Q. If we then moved to Column 3, that's headed Black Population and again gives population figures for each of these three areas; is that correct?

A. Yes.

Q. Is that an estimated figure or did the 1970 census

actually indicate whether the population in those areas was black or white?

A. It is a count of the black population.

Q. Column 4 is headed High School Age, and again gives us a figure for each of those three areas.

Is that an estimate or did the 1970 census data actually indicate how many of the population in those three areas were high school age people?

A. That is an actual count of the number of people living in the areas between the ages of 14 and 18.

Q. Now, while the 1970 census data will give us actual figures on the number of white and the number of black people living in a given block and on the number of high school age people living in a given block, does it provide data as to how many black or white high school age people there are in a given block?

A. No, this is one of the difficulties in using the third count data. The third count data which gives data for a very small geographic area, a city block, will not give as complete data as other counts. This is in line with the U.S. Census Bureau's provision protecting confidentiality.

The U.S. Census Bureau will not tabulate data for certain variables on a very small area, because they feel that this is likely to violate confidentiality of the response.

Q. So if we take the figures on the basic Colonel White attendance zone in 1970, we have an actual count that there were 253 black people living in that attendance area, but we have no way of determining whether as a matter of fact any of those 253 black people in that attendance area were high school age, sub-high school age or adults; is that correct?

A. No, that figure had to be estimated.

Q. Now, let's move with that background, move to Column 5 of your table for me.

That's headed Percentage Black High School Age. Can you explain that for me?

A. In Column 5 I estimated the percentage of black high

school age children by apportioning the high school age population, dividing it in the same manner that the black population existed within the total population. I did this by simply dividing Column 3 by Column 2. So that this is an estimated figure using the assumption that the number of black high school age children in the population existed in the same proportion as black population existed in the total population.

Q. Then if we move to Column 6, which is headed Possible Number of Blacks High School Age, can you tell us what that column represents and how it was compiled?

A. That was simply taking the estimated percentage of blacks and multiplying it by the high school age population.

Q. Is the resulting number any more than an estimate of the maximum number of high-school age black students that might have been in that area?

A. Yes, that is the number, 22 is the estimated number based on the assumption that the population was apportioned among high school age as it was in the general population.

Q. All right. And as far as that figure's accuracy, I assume that would be affected by whether there were in fact any kids in that area or whether they were adults that represented the 253 people, or whether those children were attending public school or private school and other factors?

A. Yes. The figure in Column 6 represents a maximum number of possible high school-age children. It should not be mistaken or confused with the number of pupils that actually existed in the system.

It was my desire when I was constructing these tables to try to estimate the maximum impact of the option attendance zones in terms of its segregative effect. So that in a sense this is representing an upper boundary level. It doesn't represent an actual count of the students that existed in the system.

Q. At the lower right-hand part of this Table 2 there is a set of figures under the heading "Colonel White Enrollment 1969-1970."

Where were those figures taken from?

A. Those figures actually came out of the file that was used to construct Table 1.

In other words, this was an actual count of the enrollment that existed in Colonel White in the academic year 1969-1970. I chose this year because it corresponded, of course, with the 1970 Census figure which was taken as of April 1st, 1970.

Q. All right. Is that the reason that you didn't use the 1972 school year when this was –

A. That's right. In other words, I wanted to compare apples with apples.

Q. And what were the figures in 1969 and '70?

A. The total Colonel White enrollment in the academic year 1969 and '70 was 1,741 total.

I imagine that this was the ADM as it is known in the school business, this is the average daily membership, which is the figure that the school district has to supply to the State Department of Education in order to receive their state funding.

The number of blacks was 503, the percentage of blacks in the school system was 29 percent.

Q. And then on the right-hand side of the lower half of the table you have some figures under the heading "Possible Enrollment Without Roosevelt Option Zone."

Can you explain what those figures are?

A. Yes. This actually represents the crux of the question that I was asked to address. And that is what would have happened to the enrollment in Colonel White High School if the option attendance zone did not exist. In effect, the – what I did was say suppose the option zone had been taken out of the Colonel White area and assigned to Roosevelt, what would the effect have been on the Colonel White enrollment?

This would have – could have reduced the total enrollment in the school to 1,004. It would have removed a large number of black students from the system. It would have left 83 black students in the Colonel White High School. And it

would have reduced the black enrollment to eight percent. In other words, creating a racially imbalanced school.

Q. Now, I notice in your Column 6 at the top of this page the estimates as to the maximum number of black students in these various zones. You have 22 in the basic zone and 420 in the option with Roosevelt, none in the option with Kiser. So there would be a possible total of 442 students, is that correct, of high school age?

A. In other words, the estimated maximum number of black high school students in that area was 420. What that shows is that the – a large percentage of the black enrollment that was going to Colonel White High School actually resided in the option zone, not in the basic attendance zone. The effect then of removing that option zone from Colonel White High School would have meant that they were no longer really available as a pool of students for the Colonel White.

Q. If I compare the figures in your Column 6 with the actual current white enrollment in '69 and '70, it appears that the possible number of black students of high school age living both in the basic zone and the optional area with Roosevelt was 444, while there 503 black students in fact attending Colonel White.

What is the explanation, if any, for that discrepancy or apparent discrepancy?

A. That discrepancy immediately came to my attention when I was performing the analysis. I started to ask the same kind of questions and found that at that time there was a freedom of enrollment plan in operation within the Dayton School System which allowed students to cross the high school attendance lines. Again the criteria I was told were that students could elect to go to another high school that offered courses or curriculum that weren't available within their basic attendance zone, at the high school within their basic attendance zone. So that in effect it shows that a number of the black students that were attending Colonel White High School at the time did not come out of either the basic attendance zone or the option attendance zone. There were

some black students actually enrolled in Colonel White in 1970 that came from outside of those two zones.

Q. Does that also explain why the possible enrollment figure in your computation here of what it would have been without the Roosevelt optional zone refers to 83 potential black students instead of 22 possible students shown in the basic zone itself?

A. Yes.

Q. That's again freedom of enrollment?

A. That's right. That's the enrollment that could have been attributed to the Freedom.

Q. What is the significance of these figures then that are shown on Table 2, Dr. Treacy, in your opinion?

A. In my opinion it shows that the option zone with Roosevelt by 1970 was including a geographic area in the attendance zone that was integrating Colonel White High School.

As a matter of fact, the existence of the option attendance zone was having an integrative effect by 1970.

Q. Let's turn to Table 3. Is this table structured in the same manner as Table 2?

A. Yes, with one noteable exception, I changed Column 3 to the count of the white population, and I conducted the analysis for Roosevelt High School attendance zone in terms of the counts of white population rather than black in order to highlight the situation there.

Q. Table 3 relates to an analysis of the population in Roosevelt High School attendance zones in 1970; does it not?

A. Yes.

Q. And there instead of a basic zone instead of two options you had a basic zone and the one option with Colonel White that we have discussed from the Colonel White point of view?

A. Yes.

Q. And are the six columns broken down and either taken

from Census block data or estimated as you had estimated the first?

A. Yes, the first three columns actually represent data that was taken off the third count summary tape file. The Column 5 and Column 6 were constructed in the same manner as were the – on the previous table. The only thing being that Column 5 dealt with the percentage of white high school age children and the possible percentage of white high school age.

The count was in Column 6.

Q. All right. Again, the basic block data from the census indicates that there were 997 white people out of a total population of 18,368 living in the basic zone area. Is there any way of knowing through census data whether any of those 997 people were high school age people?

A. No. As I mentioned earlier, the racial composition with regard to age does not exist in the third count data.

THE COURT: Excuse me just a moment. Up to a point I was following this, and then my limited mathematics begins to take over. I have some problems. It appears to me, if I understand this, that unless you have a very large number of people who are neither black nor white you have a total of six people who attend high school from the basic zone. Now, that's obviously impossible, and I don't understand it. If you'll look at Column 5 of Table 2 you have one black high school aged person.

THE WITNESS: That's one percent, sir.

THE COURT: Excuse me. I beg your pardon. Well, why do we then only have a total of six percent in the basic zone of black and white combined? Is that six percent of the total population are high school age, is that what you are saying?

THE WITNESS: That's right.

THE COURT: I see. Thank you very much. You may proceed.

MR. GREER: Before I proceed I must confess I got lost. Where is the six percent figure?

THE COURT: One plus five. There is one percent black, five percent white.

MR. GREER: Now, I hope we are all back on the same track, Mr. Treacy.

THE COURT: That much I can do in my head.

BY MR. GREER:

Q. Did you again with regard to Roosevelt get the figures as far as the school year in which the 1970 census took place as to actual enrollment and then based on your block data and the maximum estimates from that workout a possibility of what might have happened had the Colonel White optional zone been a part of the Roosevelt High School attendance zone rather than being an optional area?

A. Yes, I did.

Q. And what did you find?

A. The data on the lower left is the actual enrollment figures at Roosevelt High School. They show 1703 students were the total enrollment, and 700 of those were black. So that it was virtually a 100 percent black enrollment in the 1969-70 academic year.

On the right-hand side I estimated what would happen to the enrollment in Roosevelt High School had the option zone been folded into the Roosevelt basic zone. This would have shown an increase in enrollment to 2440 students. 2123 of them would have been black, and this still would have left the high school racially imbalanced with 87 percent of the student body black.

Q. What is the significance of these figures, especially when compared with the figures in Table 2?

A. The significance of these figures is that there were not by 1970 enough white high school aged children left in the option attendance zone to integrate Roosevelt High School. However, there were enough potential black high school aged

students in that optional attendance zone which had a significant impact on integrating Colonel White.

Q. Let's turn to Table 4, which relates to the population in the Kiser attendance zones in 1970, and again this data is arranged in the same manner as you computed and arranged the data in the previous two tables; is that right?

A. Yes.

Q. Here we again have a basic zone and one optional zone, that being the option with White?

A. Yes.

Q. I should say Colonel White in the context of this case.

A. This table is identical to Table 2 with respect to all the headings.

Q. And then you once again put down the figures for the enrollment in the year from which the 1970 census was taken and figured out a possible enrollment if the option zone with White had been completely included in the Kiser district?

A. Yes.

Q. What did you find?

A. There were only two blacks living in the option zone, so that out of the total population in that option zone – that's Census Tract 1. It's the area that lies up again the river, I guess, and it's partially enclosed by I-75. There were simply no blacks of any significant number in the option zone. So it had no effect one way or the other.

Q. And I see from your figures that the actualities and the possibilities both would produce a five percent black spread of population?

A. Yes. In effect what I was saying here was that the shift in this option zone either between Kiser or Colonel White would have had no effect on the racial balance of either school.

Q. Now, you haven't prepared for us a table with respect to Westwood-Jackson. Can you explain to us why you didn't do that?

A. Well, under my original injunction I was told that I

had to prepare this material for, I believe it was, an October 10th date, and crashing, I simply didn't have time at that time to put out the table, and I guess I ran out of gas. I have the results in a printout, but they essentially show that between Westwood and Jackson Elementary Schools the same result would have obtained as in the Kiser-Colonel White case; that is, in this case in the Jackson-Westwood Elementary area the population of both school attendance zones was totally black. The population in the option area was almost totally black. It would have had no effect on the racial balance of either school system had you shifted the option attendance zone into one basic area or another.

Q. Likewise, you've prepared no table in connection with the Fairview-Roth optional attendance area. Can you explain to us why no table was prepared with that?

A. Again, there were so few students out of – that area has very few students. I think there were two or three students in the area. It simply would not have any significant effect on the racial balance.

Q. Now, could you explain for us Table 5 of this exhibit, which is the last table and appears to be set up a little differently from the others?

A. Yes. Table 5 really dealt with the dynamic aspect of the question. By this time, of course, I had zeroed in on the Roosevelt-White option zone because this was the one option zone that I found where the existence of the option zone did have an effect on the racial balance if you shoved it from one school to another. And I wanted to look at the racial composition of that option zone earlier in time, like in 1960.

Now, in 1960 I did not have the third count Census tapes for 1960. So I defined the option zone in terms of tracts. Actually the tracts overestimate the population because the attendance zone does not actually contain all of the blocks that exist within these tracts, but again I was looking at it for a maximum figure.

Q. In other words, the reason that we would have a maxi-

mum figure here is not because of an estimate but because the actual blocks that compose the optional zone would be less than the area covered by the 1960 tracts?

A. That's right. In effect my earlier analysis, which dealt with blocks geographically defined the attendance zone exactly. In other words, only the blacks that actually existed within the zone were put into the zone. In Table 5 you actually have blacks included because the tracts overlapped the attendance zone in some areas.

Q. And I take it the first two columns are just comparing numbers on the Census tracts from 1970 to 1960?

A. Yes. The first two columns – the first column defines the 1970 tract number. The second column defines the 1960 tract number. The third column –

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Q. What about the third column? What is that?

A. The third column is the black population count that existed within each of those tracts in 1960. That shows that there was a maximum black population within the attendance zone, the optional attendance zone of 316 people in 1960 and –

Q. And then if we look to the White-Kiser optional zone there was a maximum black population of three according to this?

Q. And that would be at any age level?

A. That's right.

Q. Then what is the last column on this table?

A. The last column is not an estimate. The last column is an actual count because when it comes to tract data on the tract level there is a racial breakdown given for the tract data. So this is not an estimated number.

This gives the actual count of black high school aged children that existed within these tracts as of 1960, and it showed that there was a total of 32 black high school aged children that lived within the Roosevelt-Colonel White optional attendance zone in 1960.

Q. Is that what it shows, or does it show they lived within the tract that included that area?

A. Yes. In other words, the largest possible number of blacks that lived within that area in 1960 was 32. There could have been less because some of these 32 might have actually lived in those parts of the tracts that weren't in the attendance zones.

Q. Then what was the count in White-Kiser as of 1960?

A. There were none.

Q. What is the significance of the figures that you have in Table 5 compared with the 1970 figures that you put together?

A. Well, this showed that there was a dramatic change in the racial composition of the Roosevelt-Colonel White optional attendance zone between 1960 and 1970, because in 1960 there were only three possible black high school aged students that could have lived in that zone, but by 1970 there were 420. The fact that the School Board did not fiddle with the option attendance boundaries during this period would indicate to me, if they were using the option attendance zones as a device to maintain racial segregation, they were either very inept or didn't set up the option zones for that purpose.

Q. As a result of your study do you have an opinion as to the effect of these four optional zones on the racial composition of schools in the Dayton School System in 1970, a few years before this suit was filed?

A. Yes. By 1970 the option zones were affecting the racial balance mainly of Colonel White High School, and the effect was to integrate Colonel White High School rather than segregate it.

Q. Do you have an opinion as to whether the optional zones that you have studied were used as a means of segregation as the racial composition of schools changed during the ten-year period before 1970?

A. No, because – excuse me. Phrase that question again. I'm not sure I –

Q. All right. Do you as a result of your study have an opinion as to whether the optional zones were used by the School Board as a means of segregation as the racial composition of these schools changed?

A. No, because Table 5, of course, when taken in conjunction with Table 2 shows that there were dynamic changes in the racial composition of the attendance zone area, and the School Board did not change the attendance zone area when this took place.

Q. When you answer my question "No" did you mean no, you didn't have an opinion, or that your opinion is no, that they were not used as a means of segregation?

A. No, they were not used as a segregative device.

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Q. What is your field of expertise, sir?

A. I have a number of fields of expertise within economics; public finance, the analysis of large socio-economic data bases, price theory.

Q. Price theory?

A. Yes.

Q. Your publications include a study of energy conservation?

A. Yes.

Q. Location of mobile homes?

A. Yes.

Q. Surface mining and the effect of that on — impact on energy in the Ohio real estate industry?

A. Yes.

Q. And another study, mobile homes in Ohio?

A. Yes.

Q. And you have a study, Collect Negotiations and Work Stoppages?

A. In public schools, yes.

Q. And power equalization in school finance?

A. Yes.

Q. Have you done any studies of school segregation?

A. No.

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[R. IV. 235-239, Vol. 2] Q. Looking at Table 3, sir, the bottom of the page, would I be correct that looking at Roosevelt High School attendance zones in 1970 and including within the optional attendance area, you have a total possible enrollment of 2,440?

A. Yes.

Q. That's looking at it as though it were a single geographic zone and did not have an optional area taken out?

A. That's right.

Q. And the population is 2,123 black? When I say population I mean pupil population?

A. Yes.

Q. Would I get the white population simply by subtracting those two numbers?

A. The possible white population of high school age, yes.

Q. That's possible in the sense that if you included the optional area within it?

A. Yes.

Q. That would give me 317 whites; would it not?

A. Yes.

Q. So looking at Table 3 in 1970, 317 whites got out of the optional attendance zone and went to school at either Colonel White or some other school; is that correct?

A. They didn't get out of the optional attendance zone. They were in it.

Q. I'm sorry. They got out of going to Roosevelt; didn't they?

A. Yes.

Q. Leaving Roosevelt 100 percent black; is that correct?

A. Yes.

Q. If they had been in Roosevelt it would have been 87 percent black?

A. Yes.

Q. So looking at the optional attendance areas having been taken from Roosevelt the option provided an outlet for 317 whites to get out of the school; is that correct?

A. Yes.

Q. Now, suppose in 1970 you had moved the geographic boundary of the option or the old portion of the Roosevelt zone, whatever you want to call it, moved that north. That would have taken in terms of demographic data more white students; would it not?

A. Do you mean if they had included the option zone in the Roosevelt basic attendance zone?

Q. No, no. Look at the Roosevelt zone with the option as part of it, and if they had moved that northern boundary further north that would have taken in more whites in terms of demographic data; isn't that correct?

A. Yes.

Q. And that would have brought more whites into Roosevelt if they hadn't had an option to get out; is that correct?

A. It would have created the possibility, yes, of more white students in the Roosevelt zone, yes.

Q. Assume, if you will, sir, that a transfer policy – an option is a form of a transfer policy; would you agree with that?

A. I'm not certain I follow.

THE COURT: It's a choice. Okay. Those transfers and options are choices, right. Let's go.

Q. Suppose you had adopted a criteria where only those transfers which promoted integration would have been granted from the optional area. That would have still permitted the black students who exercised the option to go to Colonel White; is that correct?

A. Yes.

Q. But it would have prohibited the whites in the option area from going to Colonel White; would it not?

A. Yes.

Q. Now, talking in terms of the effects of an option, if

an option over a period of time has permitted whites to avoid attendance at one school and go to another school – I don't mean to suggest that's the only thing it did, but let's do this in pieces, if we can. Does the fact that whites are allowed to clear out of the black attendance zones, in this case Roosevelt, tend to make Roosevelt a blacker school?

A. I'm not sure I'm following the question, sir. Would you please –

Q. If you let whites clear out of a school zone by creating an option – and I'll put aside what black students may have an opportunity to do as well. If you let those white students clear out of the blacker school, does it not make that school blacker yet?

A. Yes.

Q. And so if you ended up with Roosevelt as a 100 percent black school in 1970, 1972, would not the effect of the option still be present?

A. The option that you've assumed?

Q. Yes.

A. Yes.

Q. An optional attendance area, you would agree, has effect on at least two schools; does it not?

A. (Indicates affirmatively.)

Q. And directing your attention to Table 5, let me ask you a brief question there. To be sure I understand it, the Column 1970 tract number is simply put there as a cross-reference?

A. Yes.

Q. This is really a 1960 table; is that correct?

A. Yes.

Q. And there was – or do you know whether or not there was block data published, not on tape, but published for 1960?

A. Yes.

Q. So you could have used the blocks for your analysis hand counting them as you did and identifying them with the overlay; is that correct?

THE COURT: You have gone through this, Mr. Lucas, and I understand what is involved. Would you proceed, please?

MR. LUCAS: Well, that's not my basic question.

THE COURT: I understand, but you are going into methodology and that has been explained.

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D. TESTIMONY OF ROBERT B. RICE.

[R. IV. 375-383, Vol. 2] Q. Will you state for the record your name and address, please?

A. Robert B. Rice, 6212 Dayton Farmers Bill Road.

Q. And how long have you resided at that address?

A. Fourteen years.

Q. And where did you reside prior to that time?

A. 1608 East Fifth Street.

Q. Is that in Dayton, Ohio?

A. Yes.

Q. How long have you resided in Dayton, Mr. Rice?

A. Sixty-six years.

Q. Mr. Rice, you have not testified in this cause before; have you?

A. No, I haven't.

Q. Now, Mr. Rice, have you compiled and/or written the history of blacks in the City of Dayton?

A. Yes, from 1796 to the present.

Q. And, Mr. Rice, does that history include a section regarding education?

A. It does.

Q. And does this section include a history of racial segregation in the Dayton Public School System?

A. Yes.

Q. And, Mr. Rice, would you relate to the Court the instances of such segregation?

THE COURT: Beginning when, Mr. Austin?

MR. AUSTIN: I would like for you to – as compiled in your study, and then I would like to – your Honor, the purpose of asking him to give a general overview of the segregation in the Dayton Public Schools is a background to get to the initial question of the intentional nature of such.

THE COURT: Mr. Austin, I am not going to permit a testimony that begins, for example, with the Northwest Ordinance of 1798. I believe that there is a point in time where this becomes so attenuated that it has no significance to this inquiry. That's why I asked you with what date do you propose to begin.

MR. AUSTIN: We can begin at the 1900's, if that would –

THE COURT: No. Is that your objection, Mr. Greer?

MR. GREER: That's my objection as well.

THE COURT: I will sustain the objection.

MR. AUSTIN: Your Honor, we would only state that there has been a course of segregative practices and policies within the Dayton School System, and we feel that in order to substantiate the intentional nature of the present effects of such policy that it would be pertinent to relate this history to the Court.

If the Court would allow us to start at a more contemporary time, we would ask the witness if he would relate to the Court any acts of segregation which he has either observed himself or thruogh his studies since 1940.

MR. GREER: I would object again, your Honor.

THE COURT: I'm going to sustain the objection and, Mr. Austin, I'm going to limit my inquiry to 1954, and I will be happy to hear anything that you have to present subsequent to that date.

BY MR. AUSTIN:

Q. Okay. Would you relate such instances of segregation in the Dayton Public School System since 1954?

A. Well, there really isn't that much since 1954.

Q. Okay. Mr. Rice, I would like for you to state this for me then: Could you tell the Court what is the – or in 1972,

what was the effect of past segregations in the Dayton Public School System?

MR. GREER: Objection, your Honor.

THE COURT: I will overrule the objection.

A. Would you state that again, please?

Q. Could you state what was the effect of past segregation in the Dayton Public School System in 1972?

A. Are you talking about the results of what had happened in the previous years?

Q. Yes, sir.

A. Well, we had definitely a segregated school so far as faculty and students were concerned.

Q. Mr. Rice, at that time did we have racially identifiable schools?

A. Yes, especially in the West Side area.

Q. And were there also racially identifiable housing patterns in the City of Dayton?

A. That is correct.

Q. Mr. Rice, from a study of your history, could you describe to the Court what, if any, relationship does the segregation in the schools or the effects of segregation in the schools have on the development of segregated housing patterns in Dayton?

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A. Are you talking about segregated patterns of the schools in relation to the housing?

Q. Yes, sir.

A. Now, Dunbar High School, Roosevelt High School in particular became all black due to the segregated housing patterns. Also grade schools such as Garfield, Willard, Wogaman, Highview and some of the grade schools in the Westwood area, the residential part. The schools automatically became black because of the residential segregation.

Q. Now, Mr. Rice, you are familiar with the construction of the new Dunbar High School; are you not?

A. Yes.

Q. And that high school was considered to be an all-black school?

A. Yes.

Q. And it was built in an area that has what type of housing pattern?

A. Entirely black.

Q. And since the construction of the school, has that housing pattern changed in any way?

A. No.

Q. Did it become more black, was there more construction in that area?

A. Almost entirely black.

Q. This was after the construction of the school?

A. That's right.

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Q. Mr. Rice, I would like for you to tell me whether or not the segregative policies and practices of the School Board affected the housing development of these neighborhoods, or the patterns?

A. Would you repeat that again, please?

Q. Whether the segregative policies and practices of the School Board affected the racial development of the neighborhoods?

A. I'm quite sure it did.

Q. And would you explain to the Court your answer, please?

A. Well, as they — the schools become more segregated, why, the housing patterns became more segregated. This was interlocking, interwoven together. You are bound to have the two of them locked together irrevocably.

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Q. As you have indicated, Mr. Rice, from your observations, the schools in Dayton took on their complexion as being predominantly black schools or predominantly white schools

as a reflection of the residential patterns in the community; isn't that right?

A. That's correct.

Q. And your own school was Stivers; was it not?

A. Yes.

Q. And prior to that you attended Ruskin?

A. That's correct.

Q. And those were schools that were in the neighborhoods where you lived?

A. That's right.

Q. And they were predominantly white schools; weren't they?

A. Yes.

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E. TESTIMONY OF MILEY WILLIAMSON.

[R. IV. 384-387, Vol. 2] Q. Would you state for the Court your name and address, please?

A. Miley O. Williamson, 1421 West Fifth Street, Dayton, Ohio.

Q. Not being offensive to the lady, but how long have you resided in Dayton?

A. Around 50 years.

Q. And did you attend the Dayton Public Schools?

A. Roosevelt High School.

Q. And when did you attend Roosevelt High School?

A. I graduated in '29.

Q. And, Mrs. Williamson, what is your present occupation or position?

A. I'm executive secretary to the Dayton Branch of the NAACP.

Q. And how long have you held that position?

A. Around 30 years.

Q. And, Mrs. Williamson, in your capacity as the executive secretary of the Dayton Chapter of the NAACP, have you had

an occasion to appear before the Dayton Board of Education to protest or complain about segregation in the Dayton Public Schools?

MR. GREER: I will again object, your Honor, unless we have the time period.

THE COURT: Well, I will overrule the objection and ask after this preliminary question is answered that you then identify the time.

THE WITNESS: Many times.

BY MR. AUSTIN:

Q. Okay. And will you state for the Court when such appearances were made and the nature of the protest, if you will?

A. Well, we objected to the two swimming pools at Roosevelt High School, there was a swimming pool, one for blacks and one for whites. Then there was the –

Q. Will you give a time frame for this?

A. I'm sorry, I cannot give it, no, I cannot. But I know that we did. Another occasion –

Q. Okay. After making such a protest, what occurred, if anything?

A. They eliminated the two swimming pools. Then it was for boys and girls, not for black and white after we made a protest.

Q. And do you recall making any further protest to the Board regarding segregation in the schools?

A. Yes. They transferred the children from Shawen Acres, from Shawen Acres over to Dunbar and Garfield School. We protested that.

Q. And were there any other occasions when you –

A. Yes, we protested the building of Dunbar High School.

Q. And will you explain the nature of this protest?

A. Well, we felt – in those days that particular section of –

THE COURT: Excuse me, when was that?

THE WITNESS: Dunbar was opened – Dunbar High School I think was opened in '62, I believe, and prior to that,

to the building of that school, the NAACP protested the building of the school in that particular area because, if I recall, this was supposed to be the worst slum area in the country. There was a garbage disposal unit, the cemetery was there, there was a dog pound there, and for many reasons – those were some of the reasons that we protested the building of that school. And then on the other hand we figured that it would be another black school.

Q. And what did the School Board do as a result of that protest?

A. They built the school.

Q. Could you tell the Court what the – First of all, in terms of trying to put a time frame, I would assume that the Roosevelt incidents or the complaints about the segregation facilities in Roosevelt was in the '30's and '40's?

A. Oh, yes.

Q. And the Shawen Acres matter was in the '40's?

A. Yes, and '50's, yes.

Q. And the Dunbar situation was in the late '50's?

A. Yeah, prior to the building of the school.

Q. Prior to the building. And each time you made a protest to the Board and the Board either did or did not take action as a result of the protest?

A. They did not take any action on the Dunbar, on the building of the Dunbar school, no.

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[R. IV. 392-401, Vol. 2] Q. Mrs. Williamson, you have referred to three specific examples where the NAACP and the Community of Dayton made protest to the Board of Education on matters that they felt were improper; is that right?

A. That's right.

Q. And the first one that you indicated was a practice of using the two swimming pools at Roosevelt High School, one for blacks and one for whites?

A. Right.

Q. And upon your protest of that the Board changed that; didn't they?

A. That's true.

Q. And that all occurred better than 30 years ago?

A. Oh, yes.

Q. And the second thing that you have mentioned historically was the Shawen Acres situation, and as I understand it from the history that I have acquired in this case, that was a situation where the Orphans Home moved from a location that was near Garfield School to a location on North Main Street, the present Shawen Acres, isn't that right, and then the students continued – the black students continued to come to the school that they had gone to at the old location?

A. I don't think that's quite accurate. There was a building there, but that had nothing to do with the Board of Education moving those children from Shawen Acres way up there on Main Street over to West Dayton and Dunbar and Garfield School, I don't think those things connect at all, Mr. Greer.

Q. Again whenever you protested that situation, whatever the implications of it, the Board changed the practice?

A. They eliminated it.

Q. They eliminated it?

A. Yes.

Q. That again was 30 or more years ago?

A. No.

Q. When was it, early 1950's or late 1940's?

A. It wasn't 30 years ago, because Mayor McGee was our attorney for that case, and he hasn't been in Dayton 30 years, that's why I know it wasn't 30 years.

Q. There wasn't any case in the sense of going to court over that?

A. No, we didn't have to. We appeared before the Board objecting to it.

Q. Then the Board changed the practice?

A. This is true.

Q. Now, the third thing that you have mentioned was the

locating of the new Dunbar High School in 1962, and there you objected to the site chosen for the school?

A. Yes, we did.

Q. And as that school was built and as it exists now, it's on a rather large and what is now beautiful site; isn't it?

A. Yes, but it wasn't then.

Q. Are you aware that Belmont High School over on the other side of town was built on what used to be a garbage dump?

A. No, I didn't know that, no.

Q. And part of the building of the Dunbar High School in 1972 involved renovating and improving the land so that there was in essence a park around the school; isnt' that so?

A. That may be true, what you are saying, but we were concerned with having another racially identifiable school. Being in that area we knew following the patterns of the Board of Education, what they had done to us before, it would be an all black school, and that's exactly what it turned out to be, all black.

And then a lot of housing developments came in there later and it all became more and more segregated because Dunbar High School was there.

Q. But the students in that area were essentially black and, therefore, the population of the school was black; isn't that right?

A. Yes.

Q. Now, as far as your objections that the NAACP made to the selection of that site, let me refer you to Defendants' Exhibit N, which is a copy of meetings – of a regular meeting of the Board of Education on December 10 of 1959, and ask you to review that, if you will, for me.

A. I will have to have my glasses.

Q. All right.

A. And I think I know what this is going to say.

Thank you. Yes.

Q. Do you recall appearing before the School Board on

that date on behalf of the NAACP and withdrawing the formal objections that had been made to the selection of the site?

A. I'm sure that I did.

Q. As far as the swimming pools at Roosevelt and the Shawen Acres children are concerned, none of those practices existed in 1972 in the Dayton School System; did they?

A. No.

Q. And as I understand it, when you went to school in Dayton, you attended Roosevelt High School?

A. Yes.

Q. And at that time Roosevelt High School was predominantly a white high school; wasn't it?

A. Yes.

Q. And you lived in close proximity to the school and, therefore, attended?

A. On Norwood Avenue, yes.

Q. As I understand it, ever since sometime in the 1940's you have held your present position as executive secretary of the NAACP?

A. Yes.

Q. And you have given continuous service in that position from the 1940's right up to today?

A. That's right.

Q. And, of course, as executive secretary of the NAACP, you have considered this lawsuit as your case, in essence; haven't you?

A. More or less, yes.

Q. And you personally have been involved in this litigation in all of its stages in the last five years; isn't that right?

A. This is the first time I have ever testified.

Q. But as far as being involved in the suit –

A. I have observed, yes.

Q. All right. Now, as far as Roosevelt is concerned, the school that you attended in 1929, as the years pasesd from 1929 up to the present, the racial mix in the neighborhood surround-

ing Roosevelt changed until that school became predominantly black; isn't that so?

A. Right, right.

Q. And in the area – in the City of Dayton School District, am I not also correct that from early 1950's up until the present year the percentage of black population has increased from something like 19 percent to 54 percent?

A. Yes.

Q. And am I not also correct that as that population increased the schools in the areas where that population was increasing got blacker and blacker in their student composition?

A. Yes.

Q. And would you not agree that this change in those schools was simply a reflection of the changing population of those neighborhoods?

A. Not in the instant of Dunbar High School's, because there were no houses there then, very few.

Q. But as houses were built there, this was again a reflection of the people who lived there?

A. The school was there and the people went where the school was.

Q. And you can recall that I took your deposition in this case just last week?

A. Yes.

Q. And do you recall this question and answer being asked, and this was at page 16 of the transcript:

"Question: Are you aware of any changes that the Board of Education made in boundary lines that caused this to happen, the schools getting blacker and blacker, or was this simply a reflection of the changing population in the neighborhoods?"

And you answered me, did you not: "It could have been the last, changing of the neighborhoods?"

A. It could, yes.

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Q. Mrs. Williamson, just a few questions. First, I would like to ask you if the segregative policies and practices of the school board which you have testified to has had any effect on the segregated housing patterns that you have mentioned?

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A. Will you state your question again, please?

Q. If the segregative policies of the Board of Education had an effect on the racial composition of the neighborhoods or housing patterns?

A. I think it did, yes, yes.

Q. Also I would like to ask if the Board protested generally the segregation of pupils and teachers throughout the system?

A. Say that again.

Q. I'm sorry. Did the NAACP protest generally the segregation of pupils and faculty throughout the system?

A. Assignment?

Q. Yes.

A. Yes, we did.

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Q. Did the practices exist up until the time of the filing of this lawsuit?

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A. Yes.

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Q. Can you recall on your deposition last week, Mrs. Williamson, my asking you, after we had covered the information that you provided me on that deposition, the following question, and the question is as follows:

"And while I don't mean to belittle the importance of those things, because they are important things," referring to historical things you told me about, "none of those practices existed in 1972 in the Dayton School System; did they?"

And didn't you answer me: "No, they did not."

A. As far as the swimming pools are concerned and Shawen

Acres, no, they did not exist. But the pattern of segregation was still there, we still had the all-black schools, Mr. Greer.

Q. Right. And no one will argue with you there, there was racial isolation in the school system, there was some schools that were predominantly black and some that were predominantly white; isn't that correct?

A. Yes.

Q. This next question may sound silly, but we have to make a record.

I am correct, am I not, that both you and Mr. Rice that testified before you are black?

A. I think so.

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F. TESTIMONY OF LEO A. LUCAS.

[R. IV. 408, Vol. 3] Q. State your full name and occupation, please.

A. Leo A. Lucas, an executive administrator in a small business investment company. My occupation is a public accountant.

Q. Mr. Lucas, you hold a position with the Board of Education?

A. I do.

Q. And what is that position?

A. Member of the Board of Education.

Q. And how long have you been a member?

A. Since January, 1966.

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[R. IV. 411-419, Vol. 3] Any child anywhere in the school district may go to the school according to the Board records.

In reality, only black students attended the school. The school was established with the, in my judgment, the intent —

MR. GREER: I will have to object at this point, your Honor.

THE COURT: Well, Mr. Greer, I recognize that this is a subjective view, bipartisan, but I'm still interested in hearing it. I'm going to overrule your objection.

THE WITNESS: The school was established at the very first time in the school district history, the name of the building was selected and given to a black, named Paul Lawrence Dunbar. A black principal was hired, a black staff was hired, and the implementation of the establishment of the school was to accommodate the intent and purposes of the School Board of congregating black children in a central place where they could be taught by black staff people, and that was done at that time.

No other place in the school, in the school district history prior to that time had any such a policy, any such activity took place.

MR. LUCAS: Yes, sir. The second one opened in 1962.

THE COURT: I see, all right. So, in this frame of reference, this is the school that was established, I believe, in the early 1930's?

MR. LUCAS: That's correct.

THE COURT: All right. Then I'm not sure of your objection, Mr. Greer.

MR. GREER: My objection is that it's irrelevant on a time basis.

THE COURT: It may be, but I'm interested in hearing from Mr. Lucas. Objection overruled.

MR. GREER: All right.

THE WITNESS: What is the question again?

BY MR. LUCAS:

Q. Are you familiar, sir, with the establishment of Dunbar High School?

A. Yes, I am.

Q. Can you tell the Court what information you have about the establishment of the school?

A. Yes, sir. The information is that the school was originally established in the early '30's, and the School Board records

indicated that the principal of the school was authorized to hire black staff, and the school was – was told to be a school of open enrollment.

Prior to that, there were not schools, only classrooms for individuals assigned to black teachers.

Now, after the school had been established and the principal of the school attempted to utilize that school as a vehicle to do the job, the School Board – the School Board wanted done, that was continually perpetuated, and it remained so until it outgrew its facilities, and a decision was made to go to a newer facility.

THE COURT: Of what date, Mr. Lucas, was that outgoing of facilities?

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THE WITNESS: It was in the early '60's, about 1961, and then it was open in '62, the new building.

THE COURT: I see.

THE WITNESS: And that was a date – both of these buildings had discussions on problems with the black community.

THE COURT: Incidentally, before you proceed, who was Paul Lawrence Dunbar?

THE WITNESS: Paul Lawrence Dunbar happened to have been a black man who lived in this community and was excelling in literary skills. Paul Lawrence Dunbar was refused admission to a literary guild that was all non-black, but today none of those people who were members of that entity are a member. Paul Lawrence Dunbar is.

Paul Lawrence Dunbar wrote in dialect and in highly skillful English. Paul Lawrence Dunbar has an inscription on the Montgomery County Library here in Dayton, Ohio. Paul Lawrence Dunbar has the home of his birthplace on South Summit Street where he was born. It is now a state facility.

THE COURT: Was he alive at this time?

THE WITNESS: He was not alive, but his mother was.

THE COURT: I see.

THE WITNESS: And his mother participated in the activities and the naming and the unveiling of this institution.

THE COURT: This was intended, I gather, to honor a local citizen; is that right?

THE WITNESS: A national-international citizen. Paul Lawrence Dunbar was acclaimed not only in the United States but also in London and elsewhere in the world, and even prior to the turn of the century and subsequently thereafter he did these things and he died as a young man.

THE COURT: I assume you consider the naming of this school after Mr. Dunbar highly appropriate?

THE WITNESS: No. I'm saying it was a telegraph to this community that the School Board intended to continually practice the institutionalized racism that they had a charge to do as that segment of the entity, governmental entity in this community to make sure that it was understood that although it said open enrollment it was –

THE COURT: I think, Mr. Lucas, you missed my question or I didn't ask it properly or the third possibility is that my impression is totally incorrect. You do not consider that the use of Mr. Dunbar's name was intended to honor a man of esteem in this community?

THE WITNESS: Judge, Your Honor, I want you to understand where I'm coming from. I'm looking at it from what we call in the black community an eagle's eye view and not a bug's eye view. You are looking at it as it was generally conceived by the people who were in the decision-making processes to honor someone. The School Board didn't give that much of a "buzz, buzz" for these people they wanted to telegraph the message.

THE COURT: I see. So it would be your impression that this was not done for purposes of honoring Mr. Dunbar?

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THE COURT: It's your opinion that that was not the purpose?

THE WITNESS: That was not the purpose.

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Q. Mr. Lucas, as a teacher were you aware of the policy of the Dayton Board of Education that black teachers until 1951 were not to teach white children?

A. Yes.

Q. Mr. Lucas, you mentioned the opening of the new Dunbar. That was shortly before you went on the Board; is that correct?

A. That is correct.

Q. Are you aware of any protest in the black community to the opening of that school insofar as two factors; number one, the racial consequences and, number two, a separate protest with respect to physical surroundings?

A. As a member of the NAACP at that time I participated in the protest.

Q. And was the protest on both of those points or one of those points?

A. The beginning of the protest was on both points and subsequently it was not.

• • •

THE WITNESS: Yes, not on both, not on both of them, not inclusive.

BY MR. LUCAS:

Q. With respect to the racial consequences of the location of the school in that particular place, what was your understanding of the response of the Board to that issue?

A. I don't fully understand that. Now, will you repeat it?

Q. Now, with respect to the protest you said it was twofold, number one, to the racial consequences of locating the school where they built or proposed to build and as to that point what was the response of the Board of Education? Was that a matter that could be negotiated?

A. We informed the NAACP and the other – which was a spokes entity for the black community with other entities,

and we said that is not really negotiable, but subsequently we did go into some other avenues that caused the school to be the quality of school that it was alleged to have been.

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Q. Mr. Lucas, did the Board agree to discuss changing the location of the school in order to avoid a segregated enrollment, or did they decline?

A. They declined that.

Q. All right. Did they agree to discuss the physical plans and improvements in the proposal for that plan?

A. They did agree to discuss and collaborate with the community on that.

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[R. IV. 427-428, Vol. 3] Q. Did the actions – strike actions – did the administrators act in reaction to the perceived community pressures in terms of avoiding disturbance of particular white areas?

A. It was a continuous thing. Being a black person sees this, in my judgment, from a different point of view. We see it as a – as the decision-makers, the system, as we sometimes term it, ruling and making decisions continuously against, and telegraphing that same message to the white constituency that we are going to make sure that you are not hurt, and that's the kind of perpetuations that's been going on. That's what it is, the intent, and it was deliberate on the part of the Board to do that.

Q. Now, you have been a member of the Board since 1966. Have you experienced this process that you have just described? Is it something you have personally observed as a Board member and as Board president?

A. As a Board – as a senior Board member currently, from the time I have first set foot, sat in one of those seats, I have experienced the same undercurrent of pressure from the members of the Board.

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[R. IV. 434-438, Vol. 4] Q. Mr. Lucas, I direct your attention to Plaintiffs' Exhibit 11-A, which is the determination of March 17, 1969 from the Department of Health, Education and Welfare with respect to several issues in this system. Directing your attention in particular to the second paragraph, the HEW determination was that the district pursues a policy of racially motivated assignment of teachers and other professional staff. Mr. Lucas, from your experience as a teacher, your experience as a parent and as a Board member, did you agree with the determination of HEW in that regard?

A. I do.

MR. GREER: Objection.

THE COURT: Overruled.

Q. Can I have your answer?

A. I do agree.

Q. What effect, if any, Mr. Lucas, does the policy of deliberate faculty segregation have on the identification of the overall policies of the Dayton Board of Education?

• • •

A. The effect is the manifestation of the intent of the Board through the so-called white faculty in notifying the public and the et al that it's a white school. It's a pretentious manner of sending the message of the policy through the community to the school and black folks perceive that it being that.

Q. Does the effect of the faculty assignment policy reach areas other than the faculty itself, or does it affect other areas of school policy, such as pupils, school construction and so forth?

A. It's a spill-over. It's a continuous spill-over from the assignment of the faculty into the other facets of school operation, construction, pupil assignment and even the distribution of equipment, supplies and what not.

Q. Does the adoption of a plan to reassign or desegregate the faculty and its implementation over a two-year period —

does that change eliminate the effects of the past policy of deliberate racial assignment of faculty?

A. The first part of that I didn't fully get. I would like for the reporter to read that, or either you, or something, so I can be sure I understand what you are saying.

Q. Okay. In 1969 you received the HEW determination and thereafter the Board entered into an agreement to reassign faculty in a more desegregative manner over a two year period. Do you recall that?

A. Yes.

Q. All right. My question to you is having completed that process, with whatever degree of perfection it was completed, does that action eliminate the effect on schools in general of the existence of that practice for a long number of years?

A. That practice in itself does not eliminate the total problem, particularly for a — if it were designed and continuously dealt with for a long period of time it would eliminate, but it does not in the manner in which we did do it.

THE COURT: Mr. Lucas, Witness Lucas, there is a message to the black community to be obtained from a policy of requiring black students to be taught by black teachers. Why isn't it also a message to the black community when the School Board says we will now have white teachers teaching black students and black teachers teaching white students? Why is one conveyed and the other not conveyed?

THE WITNESS: See, the manner in which the message is being sent to the black community in the example you just gave also triggers the black community that there is something that does not meet the eye, and we do not perceive this to be in concert with continuous pronouncements, comments, and statements that are made by the decision-makers.

THE COURT: Is it fair for me to say there is a selective receipt of these messages?

THE WITNESS: I don't know whether it would be selective. I would say it would be fair to say a cautious receipt, just like I said yesterday.

THE COURT: You may proceed, Mr. Lucas.

Q. Mr. Lucas, the Judge's question suggests to me, assuming that a different message is sent by desegregating as opposed to segregating the faculty, let's assume that as of this morning, the Board has sent a different message, we are now going to desegregate the faculty.

A. Yes.

Q. My question is, does that action as of that date eliminate the effect of 50 or a hundred years of having given a different message? Does it eliminate it all in one year?

A. It is impossible to us.

Q. Mr. Lucas, are you familiar with the reassignment of Westwood seventh graders to Roth and Roosevelt in the earlier 1960's?

A. Yes.

Q. What was done that I believe Westwood at that time had become a black school, is that correct?

A. That is correct.

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[R. IV. 447-448, Vol. 4] Q. On the subject of the resolutions that you've just been discussing, Mr. Lucas, am I not correct that in January of 1971, the beginning of the year when these resolutions were adopted, the Board unanimously enacted a resolution in which it stated that it saw no alternative to the neighborhood school?

A. I don't recall that particular incident.

• • •

Q. This was a unanimously adopted resolution of the Board of Education on January 4, 1971; was it not?

A. According to this, yes.

• • •

Q. One of the Board members and indeed all of the Board members voted in favor of that resolution; did they not?

A. That is correct.

Q. And you were one of the Board members who voted in favor of it?

A. That is correct.

Q. You were the president of the School Board at that time; were you not?

A. That is correct.

Q. Do you recall on the same day that that resolution was adopted, the Board also unanimously adopted a resolution endorsing the concept of scattered site housing and urging all governmental and quasi-governmental bodies to adopt that kind of a principle?

A. I don't have that before me. I don't know.

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[R. IV. 454-463, Vol. 4] THE COURT: Now, I want to make sure I'm not misunderstanding you, Mr. Lucas. This is extremely important.

You are saying that in January, on January 4, 1971, this resolution was intended for public consumption for a forthcoming levy?

THE WITNESS: Yes.

THE COURT: And did not represent your views, you are not in agreement of an alternative to neighborhood schools. Is that right?

THE WITNESS: No. See, this has no alternative, we see no alternative. We did not say that subsequently we would. We said we saw it at that time, that there were no alternatives, and I can remember, after having seen this, that this is what we intended to go with. We did not absolutely state it, that there shall be no alternative and we shall keep — we said we see none now.

THE COURT: Whatever this document says, I simply want to understand now really what you are testifying to.

THE WITNESS: Yes.

THE COURT: Because if I understand it, you are saying that you signed this —

THE WITNESS: Yes.

THE COURT: For purposes of passing a tax levy at some point and not because you believed in it; is that right?

THE WITNESS: That – See, my belief at that particular point is not what you are saying, not the manner in which you are saying it. If you will recognize the events that took place from January '71 until August of '71, my belief about, say, a concept of neighborhood schools was not really solidified until these events finally came in, but all of us at that time agreed that we saw no other alternative, and we publicized that on a unanimous basis.

You must remember now, I have one vote, and I had one other purpose in mind, not this purpose. I had the purpose in mind of ultimately equalizing the educational opportunities for children. That's the only purpose that I have ever had, and whatever I did do was with that in mind, and you go along to get along.

THE COURT: Mr. Lucas, I've spent more than a few years of my life in the world of politics and I understand the policital reasoning and the political expedience, probably equally as well as you.

THE WITNESS: Thank you.

THE COURT: But I simply want to have my own understanding of what this resolution meant to you.

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Q. At any rate, Mr. Lucas, as I understand what you have testified to, your views on the subject represented in the January 4 resolution changed as the months passed by after January 4 of 1971?

A. Yes.

Q. And that on January 4 when that resolution was adopted, that you voted before as President, it was your feeling that there was no feasible alternative to neighborhood schools?

A. That is correct.

Q. And as for alternatives in the Dayton system, the only alternatives really were either to somehow get the money to

build some giant central location where all the students would come, or to bus students all over the city to mix the races; is that right?

A. That is basically correct.

Q. And as I got it, as the months went by after January 4 of 1971, your views changed as to those alternatives being feasible?

A. Yes, brought to our attention.

Q. All right. And, of course, it was the same constituents on the School Board on December 8, 1971 as had been there on January 4 of 1971?

A. That is correct.

Q. Although an election had intervened, and as you indicated, it was clear when January of '72 came around, the voting construction of the Board would change appreciably?

A. That is correct.

Q. Prior to the adoption of the December 8, 1971 resolutions, the advice of Louis Lucas as counsel for the plaintiffs in this case was sought and obtained with respect to those resolutions, wasn't it?

A. That is not – I don't believe that I – we had advice, not pertaining to the resolutions, but we had advice of Louis Lucas, but that advice was not to me, it was to the superintendent.

Q. You recall that I took your deposition last week in preparation for this hearing, don't you?

A. Yes, I do.

Q. Do you recall my asking you at page 89, "Am I not correct that prior to the adoption of the resolutions which were later rescinded, the advice of Louis Lucas, the counsel for the plaintiff in this case, was sought and obtained with respect to those resolutions," and you answered me, "I believe that was done. It must have been done with Superintendent Carle and Foster, I think the next time. I don't know the details about the legality of that or the details."

Is that accurate?

A. Yes, yes. There was a – my answer there in my judgment tells you clearly that I had, but what you were asking me confused me with some other events. The event was that Lou Lucas came to town and I didn't even know it. I communicated with my attorney, Mr. Austin, at the time, and he indicated to me that Louis was in town, had some knowledge about what we were doing, and then I asked if it were possible for him to come and talk to our superintendent, and he found out and said yes, that's – we saw to it that he saw our superintendent, but Foster was not even in the picture, to my knowledge, at that particular time.

Q. All right. And I take it the Mr. Austin to whom you refer is the Mr. Austin who is seated here at counsel table with Mr. Lucas today?

A. That is correct.

Q. I gather that you don't recall personally talking with Louis Lucas prior to the adoption of these resolutions?

A. No, other than the fact that I was asking him what he – asking through Austin that he talk with our people, but those were not talks about the resolutions to talk about preparation of the resolutions, they were already prepared at that time. We had had those prepared, and the superintendent was in turn consulting with his staff, consulting with other State Department people and so forth, and that's where the information was sought.

Q. What was the purpose of the discussion if not about the resolutions when they were to be presented a few days later?

A. The plan of – it was about – when you say about the resolutions, my interpretation is that they were discussing the whole problem of hours, doing something about the unitization of schools and school activities for children. That's what they were discussing, but with themselves and not with us as administrative people because they had to implement it, and they needed to know what we were going to do.

Q. Well, in fact, you and Dr. Carle had discussed before the resolutions were adopted the possibility of bringing

a desegregation suit if the resolutions were rescinded after they went into force; hadn't you?

A. You know, I don't recall whether that was it because as a Board member I was not planning to bring any suit. We had done what we intended to do and that was to do what was our authority and moral responsibility, to see to it that the segregated system no longer existed and that we go into the unitary system, and we did that. That was what we were doing. We had given it to the superintendent, asking of him to do whatever he deemed necessary, talk with whomever he wanted to, use the State Department of Education assistance and what not to see to it that it was done.

The people who came in to see him were people who were giving him expertise on various sections of it.

Q. Do you recall my asking you in my office last week this question? This is page 90 of the deposition.

"Before the resolutions were adopted did you have any discussions with Dr. Carle as to the possibility of desegregation litigation if the resolutions were rescinded or if they were enforced?"

Answer: "We had that. That was a foregone problem as long as way back in June or April, whenever the deadline for filing the petitions for candidates for the School Board. That was apparently going on, and we had a pretty good comprehension about the time table of that kind of action. They fit it right into the notch just like it's being done, just like right now, the same thing."

Do you recall that testimony?

A. I do.

Q. And do you recall my asking you: "So that way back in June when the petitions for the November election were filed, there was a time table that in the event that the complexion of the Board changed, this litigation would ensue?"

And you answered me "Yes"; didn't you?

A. I did. I did. And let me explain why I answered you yes, if you would. Because this same process had gone on

in other cities. We had anticipated that we who had passed those resolutions were going to be brought into litigation and brought in to the public for removal from office. We thought we were going to be the object of a repeal or whatever the word is –

THE COURT: Recall.

A. Recall, the object of a recall, and we expected that. We were anticipating that. That's what we thought was going to happen to us, and that's what I was really dealing with.

Q. I do have some information – let me ask it to you in the form of a question to see if this refreshes your recollection on these bond issues. Am I not correct that we had the joint exhibit in October of 1970 that we reviewed earlier? In November of 1970, the election on the bond issue was held and the bond issue was defeated; isn't that right?

A. That is correct.

Q. And as of January 1st, 1970, no bond issue was pending; was it?

A. Yes, there was a defeat in '70. We had to do something about renewing it for '71.

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[R. IV. 466-469, Vol. 4] MR. LUCAS: November '71. And that both of those or one of those had been presented earlier and had been defeated and brought back up.

THE COURT: All right.

MR. LUCAS: I think we ought to try to get something accurate.

THE COURT: I would like to know what occurred between those two periods of time. You may proceed.

BY MR. GREER:

Q. All right. Let's go to some of the other items that you have discussed with the Court yesterday and this morning, Mr. Lucas. First, as far as Dunbar High School is concerned, it is true, is it not, that that high school had an

attendance zone that was optional for anyone throughout the city way back in 1932 when it was opened?

A. That is true.

Q. And as I understand it, when the principal was hired there he was given discretion to hire whatever faculty he wanted; is that your understanding of it as well?

A. That is correct.

Q. And am I not also correct that when the new Dunbar High School opened in 1962 it was not a 100 percent black student school, or do you remember?

A. I was of the opinion that it was, that it could have been that there was – there was one interracial family in the neighborhood where they had white and black children in that family, and I don't recall whether they attended there or not.

Q. All right. According to the statistics that we have, the initial year's class was 92.7 percent black. I think some 153 students or so were white students in that school. Is that your recollection, or do you have a recollection?

A. I will assume that that might have been correct.

Q. All right. Now, you have testified this morning that as of January of 1971 you felt there was no feasible alternative to the neighborhood school system. You were questioned yesterday about the boundary changes that occurred with respect to some schools on the west side of Dayton way back 20 years before that in 1951. As a result of those boundary changes there was a racial mix in a larger number of schools in that area; isn't that true, or do you know?

A. There was a – when those school boundaries were changed there was a racial mix on a two-way arrangement. When the fringes of the boundary for a given school were to be changed then – and particularly if black children were in those schools, the overflow on the fringes of the boundary generally met with optional zones that the blacks would go to the black school and the whites will go to the white school.

Q. But let's look at the alternatives back there in 1951, 20 years before you began to feel there might be some alterna-

tive to neighborhood schools. The alternatives you had were, No. 1, to keep the boundaries exactly the same, which would have held Willard, Garfield and Wogaman as a black island, wouldn't it, because that's where the black people lived?

A. Well, a black island because those were the schools designated for them.

Q. Right. And the other alternatives were to change boundaries so that more black children would have an opportunity to attend classes with white students, which is the alternative the Board used, or a third alternative would have been to, I suppose, redo the whole district and adopt some system-wide plan of busing or moving children around to create some kind of racial balance in all the schools in the system; isn't that right?

A. That might have been one of the – that could be right.

Q. And the only other alternative that I can think of would be to abandon all the schools in the system and build a downtown campus and move all the children there.

A. That could have been an alternative too.

Q. So there are four alternatives and of the four the only one that was – the only two that would really have been considered feasible at the time were either leaving the boundaries as they were or taking the alternative that the Board chose, wouldn't you agree, in view of what you have already told us this morning, about your own feelings as of January of '71?

A. You almost had to take that position because that's what the Board was there to do.

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[R. IV. 471-478, Vol. 4] Q. All right. Well, let me ask you this: On your deposition last week do you recall these questions?

"If you had a school that had all black children and all white staff you would still call that a black school; wouldn't

you?" This is page 48. And your answer was, "Yes"; wasn't it?

A. Yes.

Q. "And likewise if you had a school with all white children and all black staff you would call that a white school?"

A. Yes.

Q. The perception there being based on the predominant race of the students attending the school; isn't that fair to say?

A. Yes.

Q. And then do you recall my asking you: "It's been your observation that a tipping point does occur between 45 and 50 percent of the student composition?"

A. Yes.

Q. And that has been your observation?

A. And that's still my observation.

Q. Let's then turn to this generalized question of perceptions. You've talked to us about a bug's-eye view and an eagle's-eye view of these things and, of course, none of us can help seeing anying in the world except through our own glasses and perspectives. You would agree with me, would you not, that the only alternatives from any perception to neighborhood school systems for a city like Dayton would be a system-wide situation of moving children from one end of town to the other to achieve some kind of approximate racial balance in all schools or a centralized campus?

A. I would agree with that.

Q. And those are alternatives that certainly neither you nor anybody else ever suggested to the Board as feasible until sometime after November 4th of 1971; isn't that true

A. That is correct.

Q. Now, as far as the intentions of the Board and the actions that they took over the years prior to December 8th of 1971, you don't contend that the Board acted with an intent to segregate students; do you?

A. I do.

Q. You do? I'm sorry. I didn't hear your answer.
A. I do.

• • •

Q. While with the advantage of hindsight it could be argued that the Board's policy of putting schools where students are or where they were expected to be had racial effects, wouldn't you agree that the pursuit of that policy was never intended by a single Board member as something done to separate the races?

• • •

A. It was done to separate the races.

Q. Could I refer you to page 74 of your deposition? Let me ask if you recall my asking you this question which starts at line 8.

"Is there anything with respect to an inter-relationship between general community racial discrimination and School Board acts that you have knowledge of that we haven't covered yet this afternoon?"

And your answering me, "That was the thing that I tried to – when I said the Board made certain decisions that were just automatic, it was never intended by a single Board member to be doing it to separate the races. It was understood that if you're going to make it you had to do it. That's what I'm talking about, the spill-over on the Board. The Roosevelt thing was a good example. If we were to talk – I think that man's name was Rogers, the Board member. He would not have admitted. He wouldn't admit and probably didn't even realize that he was setting up a dual thing, but it was just understood that these are things we do."

A. Yes.

Q. And that testimony was accurate testimony; wasn't it?

A. That was what I said, and any relationship to this, and exactly what I meant, but I meant it not in the manner in which you are asking it of me now. I meant it that they saw to it that the wishes of the majority in all of the decisions or

none of the decisions that were made were made on the – on behalf of that wish to make sure that the races are separated.

Q. If I understand you correctly, and I'm honestly trying to do that, I think what you are doing is making a distinction between unconscious intent and conscious intent, or is that fair to say?

In other words, people acted the way they did simply because that's the way they were made in your view, and it was a bug's eye view or an eagle's eye view or any other eye view, the intent was to make sure that the races were separated?

A. They were.

Q. But as far as conscious intent, as you told me, then you don't claim that any board member ever consciously intended to be taking any action for the purpose of separating the races as opposed to placing schools where the kids are, that kind of thing, do you?

A. Only to the extent that consciously recognizing that the results, the perpetuation of institutionalized races.

Q. You yourself as you testified to the Court this morning –

A. Yes.

Q. – didn't come to a conscious realization that any of the possible alternatives to what the Board had been doing were feasible until sometime in 1971?

A. Until we got these studies, until we got the votes.

Q. And I think you – it's true, isn't it, that there was a man who served something like 12 years as President of the School Board whom you knew well when you went on to the School Board in 1966, and you are sure in your own mind that he never realized there were any racial implications of any kind in the decisions or non-decisions that he made; true?

A. That is true.

Q. And if you could refer with me to page 75 and 76 of your deposition, do you recall these questions and answers being given by you last week?

"Question: Would I be correct in paraphrasing what you

are expressing to me that you feel that a lot if not all of the decisions of the School Board in the areas that are under scrutiny in this case were the kind of things the School Board members did, not because they had any malicious intent to do something wrong or to do some harm to black people or treat them as inferior people, but something that they simply did because they were white people and didn't perceive what they were doing the same way the black community did," and your answer was identical, the same thing?

A. Yes.

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G. TESTIMONY OF JOHN W. HAREWOOD.

[R. IV. 492-496, Vol. 4] Q. State your name and address, please.

A. John W. Harewood, 1449 Rosehill Drive, Dayton, Ohio.

Q. How long have you lived in Dayton, Mr. Harewood?

A. Since 1938. That's almost 40 years.

Q. And how long were you employed by the school system?

A. Thirty-six years.

Q. And when did you leave the system?

A. September 1974.

Q. And you retired at that time?

A. Yes.

Q. And what position did you hold at that time?

A. At the time of retirement I was assistant superintendent in charge of administration.

Q. Did you teach at Dunbar High School?

A. Yes.

Q. And by that I mean old Dunbar.

A. Yes.

Q. What year were you there?

A. 1938 to 1954.

Q. And what was the racial composition of Dunbar during that period?

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A. Black.

Q. That applied to both students and faculty?

A. Yes.

Q. Did one of your assignments at Dunbar include the responsibility for counseling?

A. Yes.

Q. All right. As counselor were you assigned to visit elementary schools?

• • •

A. Yes.

Q. As part of your responsibility in that regard were you assigned to visit the black feeder schools for Dunbar?

A. Yes.

Q. And what schools were those?

A. Willard, Wogaman, Garfield.

THE COURT: Can you identify this in point of time, please?

A. It was the years 1949 to 1954. I was counselor five years, during that period of time. I haven't named all the schools, but the schools in the general area.

Q. You were sent to the schools on the west side of town; is that correct?

A. Yes.

Q. Those were the schools you were sent to; is that correct?

A. Yes, yes.

Q. During that period of time did you have an opportunity to counsel white students to go to Dunbar?

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A. Not the first year of my counseling.

THE COURT: I didn't understand the answer.

THE WITNESS: Not the first year.

THE COURT: Not the first year?

THE WITNESS: Yes.

Q. Were there other counselors at Dunbar besides yourself?

A. One other.

Q. Were either of you assigned to go to other parts of the city to solicit students? I take it that's one of the things counselors do for schools?

A. No. Our assignment was generally to talk to eighth grade students about high school, the variety of courses which are available, how they fill out election blanks, and counsel them generally on the value of a high school education. That was supposed to be a system-wide responsibility all of us had. And incidentally, the last — at the end of our presentation we would say what was unique about Dunbar, and it was unique, that would make them want to go to Dunbar.

Q. Now, my question basically is: Were you assigned to do that at the East Side schools?

A. No.

Q. With reference to the Miami-Chapel School, were you contacted by the Central Office Administration with respect to the location of that school?

A. Yes.

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[R. IV. 501-533, Vol. 4] Q. And you objected to the racial consequences, and I believe you used the term economic isolation?

A. Yes, that's part of it when I talk about the cultural aspects, raising the level of sights of young people who attend the school. That's economic isolation, yes, sir.

Q. Turning now to the Jefferson Primary School, can you give us a date?

A. Jefferson Primary, 1960 discussion was thereabouts.

Q. And were you in the central office at that time?

A. 1960? Let's see. No.

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THE COURT: Your point about the people in housing projects is a valid one and an impressive one. This would be true of all persons, wouldn't it, white, black, Appalachian? It wouldn't matter if they were in housing projects by definition.

THE WITNESS: Yes.

THE COURT: They were unable to compete in the system?

THE WITNESS: That's right.

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Q. Your Honor's question suggested an additional question to me. Did you object to the additional factor of the racial segregation as making whatever problems that might arise from the housing project situation worse?

A. Yes, that's an added factor to the economic isolation. That's one extra hurdle over which we ask our children to get over in order to compete in our society.

Q. All right. At the time of the Jefferson Primary were you contacted also with respect to that construction?

A. Yes.

Q. And did you have a view as to whether or not that construction should be made in that location?

A. Yes, I did, and may I indicate — and this comes from building schools where children are, which I opposed educationally, morally and from every other sense, and I think the administration in the School Board who follows that are in trouble, and we are in trouble now because of that type of shortsighted policy. There were three sites, one on Faulkner Avenue, in which there is now a park. The other site was the Jefferson Elementary site. The third one is the Princeton Park site, a lot farther north.

My objection to that and to all other types of construction of schools — and permit me, your Honor, just a minute to indicate this, and this speaks specifically to the problem we're trying to resolve now. Elementary schools ideally, and check your suburbs and your affluent neighborhoods where we have schools, in order to be effective, in order to allow the teachers

and the children to inspire in them a love of learning, teach them respect of others, to teach them respect for authority and so forth, they must be small, 400 to 600 pupils, and we have ignored that specifically on the west side of town.

Now, I will answer your question. We had some complexes where there were 1400 children. When I was the principal of a school we had 1300 children. This is why I am so vividly opposed to building schools where children are. This is the same problem that's facing us here when we discuss this.

THE COURT: Excuse me. Mr. Harewood, wait a minute. I'm following you, and I recognize what you're saying. But the smaller the school the more you would have to build; wouldn't you?

THE WITNESS: Perhaps.

THE COURT: Well, its mathematically demonstrable. If you feel that 1300 or 1400 are too much in one school then you must build two schools.

THE WITNESS: And that's what I'm saying, Judge.

THE COURT: So that my question is: The smaller the school the more you must build?

THE WITNESS: Yes, and may I –

THE COURT: But you would not build them where the children are?

THE WITNESS: No.

THE COURT: Okay.

THE WITNESS: May I respond further to that, Judge?

THE COURT: Please do.

THE WITNESS: We are faced now with making decisions on the basis of cost, and I ask you when the figures came up about drop-outs and suspensions and so forth, which cost is greater and whether building schools and making them effective educationally and so forth so that we can really teach the children or run them through educationally – what do they call it, illiterate. We are graduating people who are functionally illiterate because of this saving of money and

putting a lot of money in schools and so forth. I'm asking you now, is the cost –

THE COURT: Mr. Harewood, one of the things that I have resisted with all the power at my commend the past five years is taking over and operating the Dayton School System. That's the very last thing I'm going to do, and I would concede and agree with you completely there are many, many things wrong with what it is we've been doing with education, but that is not, thank heaven, a judicial problem yet.

THE WITNESS: I have been in the system all these years and have tried the best I can to articulate this so people who have the power to do something about it would do something about it.

THE COURT: You may proceed.

A. Yes. Now, then in reference to that those were some of the reasons I objected to it, because of the fact that building a black school in Faulkner would just be an extra – another black school in another black territory, another movement of a segregated section of town for blacks and black schools. I objected to putting it on the Jefferson Elementary site because then the school is too large to begin with, and you would have two schools and a large number of children coming there. There is no way for the principals and people involved in that to do the job they wish to with children piled up on top of each other at the particular site.

My recommendation was the Princeton Park site, way up north of that, and I'm not hung up with moving children to get them to a site if there's something that's educationally sound, and my recommendation was there because there was a possibility then for the school system itself to say that we could have integrated education, and we could move and demonstrate how we can best spend our money to educate children.

Q. Did building of the primary unit on top of the other school occasion, did that further impact on the racial concentration in that area?

A. Yes, Mr. Lucas. I know the –

Q. Excuse me. Did you point that out to the staff of the Board?

A. Yes. I know what the trepidation – we go back in this. What I have to say, if I'm permitted to say this, on the west side of town, I wish we had some way to put it around. You have Louise Troy, Miami-Chapel on the same campus. We have Resident Park Primary and Resident Park Elementary on the same campus. We have Jefferson Primary and Jefferson Elementary on the same campus, see, on this side of town only. With a few exceptions, we have this concentration of children on one side, and we put administrators out there and say educate them. We were concerned when they lose respect for everything and everybody there, suddenly they're drop-outs, or become functional illiterates because there's short-sightedness in doing this.

Q. Were you contacted with respect to the location of the new Dunbar High School?

A. I was.

Q. And were you contacted on more than one occasion about that school?

A. Yes.

Q. What were some – let me go back. Did you object to the location of the new Dunbar High School? If you can answer that yes or no, then we will go to another point.

A. Yes, I did.

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Q. I have changed my question, and let me have your answer. What were your objections?

A. My objections?

Q. Yes.

A. That it was placed in the midst of already segregated schools with no possibility of any people attending unless the Board changed its policy but blacks entirely, and that according to the – and, see, I come from a high plane, I have to – I have been a curriculum man in education, and I know what

we have done to children. I know what we have done to the community without using our money wisely and telling them what we need and trying to get it because of the same general – because of the environment there, we still wouldn't have what we were looking for as far as ideal selection spots for a school.

Now, I can remember what your question was. The reasons they said that they were going to build a school there, just listen to it. This is a slum area, one of the worst slum areas. This is a chance for us to get rid –

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Q. Mr. Harewood, in your expanding on your reasons to the Board as to why they should not be able to, what response did you get to your objections?

MR. GREER: I'll object, your Honor.

THE COURT: Sustained.

MR. LUCAS: Your Honor, may I make an offer of proof?

THE COURT: Mr. Lucas, you may make your offer of proof. This is clearly hearsay. I will hear anything that you can establish other than a witness' hearsay on this issue, but this is simply not relevant.

MR. LUCAS: Your Honor, the witness was an official of the Board of Education. He was contacted in his official capacity, and what was done or not done, and the reasons therefor, is absolutely essential to this lawsuit.

THE COURT: It may well be. There is an appropriate way and non-appropriate way to present testimony, Mr. Lucas, and it does not include hearsay nor testimony by counsel. If you want to specify who said it, when, I will allow that in.

Q. Would you tell the Court, Mr. Harewood, who you met with?

A. Mr. Bagwell, assistant superintendent in charge of business affairs.

Q. After you stated your objections, what responses did you get to the objections you had advanced?

THE COURT: Would you identify this in point of time, Mr. Harewood?

THE WITNESS: The construction of this school, this is the new Dunbar, was 1962, so it's probably a year or two preceding that when we had discussed as far as the property is concerned, probably 1960, your Honor.

Q. Would you give the Court the responses to your objections?

A. The reasons for selecting the site, according to the assistant superintendent Bagwell was, first, the land was cheap, they could get a large section of land for a very nominal price. Secondly, that this was a slum area, and the city was – would be happy to eliminate that in this process, and thirdly, that after the construction, there would be an excellent place for black housing around this site.

Q. Did the Board proceed to build a school in that location?

A. Yes.

Q. Mr. Harewood, you have– let me see if I can pinpoint a time with you.

When did you go to Central Office?

A. 1967.

Q. What position did you go to Central Office in?

A. Director of secondary instruction and curriculum.

Q. As a long-time teacher and administrator in the system and as ultimately Central Office staff official, have you reviewed the pattern of school construction in Dayton?

A. Yes.

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Q. And are you familiar with the pattern of faculty assignment?

A. Yes.

Q. In the Dayton System.

From the examination of these factors, can you tell the Court whether or not race was a substantial contributing factor in the decision-making process?

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THE WITNESS: Yes.

BY MR. LUCAS:

Q. Can you explain, please?

A. Could you expand your question just a little bit? In which direction, sir?

Q. Okay, I'm sorry. Was the pattern of school construction segregative or integrative?

A. The pattern of school construction had to be segregative, still following the theme of building schools where the children are.

Q. Did the pattern of school construction tend to concentrate blacks in one particular area of the city?

A. Yes.

Q. And that would be in the west side?

A. West side, bound by a river, the river, railroad, trains, something else.

Q. Does the determination of the site of the school building by the Board of Education affect the so-called neighborhood? Does the Board, by determining the site of a building, determine the neighborhood?

A. Yes.

Q. And locations of primary schools, I believe you have already covered. Does that in turn affect the racial composition of the area of service?

A. Yes.

Q. Does faculty assignment play a role in the identification of schools on a racial basis?

A. Yes, up until 1969, I believe that's when the date is, that time where HEW entered an agreement with them to change that.

Q. And that change took place over a two-year period, is that correct?

A. Yes.

Q. Does the effect of the years that went before that of racial assignment of faculty, is that dissipated by the two-year process of change?

A. Unfortunately, no. It takes a long time to build up. We hope it doesn't take a hundred years for us to get rid of it, but it's going to take longer than just two years for us to.

Q. Does the effects of racial assignment of faculty in the past impact on students and other aspects of the school community?

A. Yes.

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Q. Mr. Harewood, after 1969, 1970, did the assignment of faculty and staff continue to be of desegregative nature, or was it actually completely effectuated?

A. Repeat your question again.

Q. After the HEW action, did the practices of the Board with regard to this particular administrative staff and Central Office staff, did it become a thoroughly desegregated process, or were there elements of discrimination which had not been remedied?

A. Well, realizing that, the fact that the process of retirements, or creating new positions and so forth would mean that it couldn't be done immediately, some of it was done, but the thing which disturbs me, I sense enough, I have indicated that there's been a resegregative approach to the model which would be for all the cities of the administrative staff and their particular responsibilities.

Q. Have there been actions at the Central Office level which have tended to eliminate blacks from positions of policy and authority?

A. Yes, sir. In order for me to make this, can I take a few minutes?

The heart of a school system, the control of the school system, the decision-making portion of the school system, depends upon the people who, first of all, operate the budget, who have the control of the budget, hold the money. Secondly, those who have control of the programs, call that curriculum, which operate in the school. Thirdly, those who have the responsibility of recruiting and appointing, the recruiting and

employing teachers for the school system, and from the teachers, most generally administrators come from that, and a fourth, very important area, is those who have the decisions, as far as making recommendations, according to location of sites, about the need for this research department, those who have all these and all of those areas, didn't hardly have one. The ultimate responsibility is in the hands of whites so in a sense to enter our school system, it's over 30 percent black now, they're the ones who's telling us, saying to us that these things should happen, and to illustrate this further –

Q. Excuse me. When you say are in the hands, do you mean at the present time?

THE COURT: Mr. Harewood, that in and of itself, in your opinion, is segregative?

THE WITNESS: Yes.

THE COURT: That a white cannot ever, no white can ever appropriately administer a school that is half black, is that right?

THE WITNESS: No, no.

MR. LUCAS: Your Honor –

THE COURT: Mr. Lucas, if you will permit me, I will ask the questions that I want answered, and I will request you to refrain from commenting.

MR. LUCAS: Your Honor, I thought you were characterizing what the witness has said.

THE COURT: Mr. Lucas, I was trying to determine whether that's what he said. If you don't mind, I will conduct this hearing as I think it should be conducted.

THE WITNESS: Now, Judge, I was saying the central office staff, which has set the model for all the other schools as far as when we say we are going to desegregate, then it can't be – it has to be up and down the line. I'm not saying that, no. I am saying we should be a part of the decisions made when over 50 percent of us are black, a high level and high point, to be able to indicate all this. Do you follow me now?

THE COURT: No.

THE WITNESS: You don't?

THE COURT: I still don't quite understand what you are saying. I want to ask you once again, are you saying that the mere fact that any part of the staff, whether it's the most sensitive or the least sensitive, is white, makes that an act of segregation?

THE WITNESS: No, not in itself.

THE COURT: Now, you have answered my question.

THE WITNESS: Not of itself.

THE COURT: Now, you may proceed, Mr. Lucas.

BY MR. LUCAS:

Q. Would you continue with your explanation please?

A. Yes. I mentioned the general areas where responsibilities for the work of a school system are. Now, in our system, you have — we have management services, we have responsibility for research and the responsibility for hiring teachers. The Assistant Superintendant in charge of that is white. You have to go way down the line — Oh, yes, we do have one black in that. He's in charge of hiring of custodians, maintenance people, and so forth. That's a very sensitive area.

We have, as far as the school system is concerned, another sensitive area is part of the program and curriculum. What happens, what goes into the schools, what happens to the school, we have one black there, but he has — he's not the assistant superintendent in charge of that. He's down the line. He has a — he is an executive director of secondary education, I think that's the title, and the high school, I want to talk about that a little bit, and the business department, which has a responsibility there, that's also all white as far as decision making. They have some blacks there who are in charge of area custodians. They have a white over them also, and in the area of pupil personnel, Dr. Goff and you know how sensitive the area is, how important that is, that we get the feeling and understanding of the children who attend our schools and try to understand and interpret it and try to work out programs for them. They have one black there.

He is a supervisor-director of special education, so I'm saying to you that in regard to the staff desegregation, it goes all up and down the line. It has been ignored at the highest level and it couldn't follow through on the other levels, and I must add that there have been several opportunities because of retirements and so forth for them to correct this.

I'll list some of them.

Directors of psychological service, the executive director of pupil personnel. He was an assistant superintendent of teaching personnel; assistant superintendent at that time, director of vocational education, the director of physical health and physical education, all those positions have been open, and we still haven't those decision-making spots, whites who are in planning, where we have over 50 percent of the school population, they're the ones who make the final decisions in regard to all of this.

THE COURT: Mr. Harewood, do you feel that black administrators would be more sensitive to the needs of black children than white administrators?

THE WITNESS: I think, your Honor, that we — if we followed that line then we would never get to the place we want to get as far as our society, as far as our schools are concerned. We have said pretty generally that children are children after you get rid of all of this, and they have all the same hopes and aspirations as anyone else.

My answer has to be categorically no. If we have that, then we are in the wrong business. I believe it has to be.

THE COURT: I want to make sure I understand your answer.

THE WITNESS: Yes.

THE COURT: You are saying that black administrators are not more sensitive to the needs of black children than white administrators?

THE WITNESS: No, I wouldn't say that because — because we are black.

THE COURT: I see.

THE WITNESS: And because we have gone through all this, we have to interpret the whites, and that's the reason my concern is that we don't have those on a higher level can interpret and – interpret this and say to them that, you know, this direction is wrong.

THE COURT: Mr. Harewood, I must be asking the wrong questions because you are giving me diametrically opposed answers. My question once again –

THE WITNESS: Yes.

THE COURT: Is it your opinion that black administrators, black principals, black superintendents are more sensitive to the needs of black children than white administrators and white principals?

THE WITNESS: Because of what they have, they're more sensitive.

THE COURT: You may explain your answer. I'm trying to find out, do you agree with that or not? Are they more sensitive to the needs of black children?

THE WITNESS: I'll say yes, if you allow me to say, Judge, also more sensitive to the needs of all children because of what they have been through. That's the reason – that's the reason I have to make strong, the point, they must be in decision-making positions to help us get through this.

THE COURT: You may proceed.

Q. You are not suggesting that all decision-making decisions have to be black, but rather that there needs to be a share in it, is that right?

A. There has to be, there has to be.

Q. I believe you have testified that there have been opportunities, vacancies within the staff of the Central Office in those kinds of positions; is that correct?

A. Yes.

Q. Have there been qualified applicants who were black, qualified people within the system who were black who were not considered?

MR. GREER: I'll object at this point. This is asking for subjective –

THE COURT: Overruled. Again, I'm not ruling on the weight, Mr. Greer. I'm simply saying this is an admissible thing.

THE WITNESS: May I say, this is subjective. I'm talking to the attorney – this is not a subjective thing. Boy, for the last three years I had the responsibility of the performance appraisal of every principal in the school system, and we sat across the table from each other, and I went down their requirements, their recommendations, what their dreams and aspirations were as far as the school was concerned, so I know, not subjective, I know because of the facts which were presented to me, that there were qualified applicants for those positions.

Q. You also are familiar with their professional qualifications, is that correct?

A. Yes, sir.

Q. Was there a trend towards putting black administration in policy – decision-making processes which had been changed in the last several years?

A. I can cite you my own experience, one particular example.

Q. Let me ask you first before we go to the example –

A. Yes.

Q. Was there at some point in time what seemed to be progress towards a balanced staff concept at the Central Office level?

A. Yes, moving towards it. We weren't there, moving towards it.

Q. Was there a change thereafter in faculty, and give us some point in time where that change either became apparent or began?

A. Yes. My – I retired in '74. In '73, there was a new administration. My title was, as indicated, was assistant superintendent in charge of administration, and it had been a

rough struggle to get to the place where a black had decision-making powers in all these areas, and my job description was changed, and the new superintendent has that power to change that, that you don't argue with that, but in the process, replaced in assuming some of the responsibilities that I had, and I pretty generally — the information I received, that that still exists. The elementary principals, there were some 59 or 60 of them for whom I had responsibility as far as the administration of their schools, and they said you are the superintendent representing the schools in this particular area. That was also me. You are supposed to carry on all the policies and so forth.

All the elementary principals were subsequently assigned to the executive director of elementary education for the same function I had, and they reported to the assistant superintendent in charge of curriculum, which is out of my department, and the same thing applied to the high schools.

They were also directly responsible, not to this department, but to an executive director in charge of high school curriculum, and his superior was not me but a white in another department.

Q. Were there changes in the job descriptions of other people in administration that you are familiar with?

A. I can only speak directly to this, of my records of people who worked directly under me. Their job descriptions were changed. I can only testify specifically to that because that I know.

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BY MR. LUCAS:

Q. Do you recall those questions?

A. Yes.

At every point, what did you do about it, did you do anything about this, if you knew about this, and I'm happy for the opportunity to say, first of all, you remember we have mentioned this, it's been information which we have tried to

state that blacks have to, in order to survive, have to learn how to sometimes live with situations which we know are wrong, and we had to object at the proper time at the proper place, and sort of catalogue this and, say, later I'll do this.

Let me give you some specific examples. You mentioned my conversation input with Bagwell. Several times that I was a teacher, I was asked several questions. I knew I had no final decision-making part in this, they were just trying to get input. When I was challenged concerning these schools' location and so forth, that was just input and so forth.

Now, let me be more specific, and to show you what I mean as far as learning how to adopt and to suggest, there was a situation when I was assistant superintendent when an action that I was not a party to, I didn't have any decision-making powers in that, and suddenly when it was being presented and acted on, I knew from being a black, I knew from having been a witness in the court what the Court was saying, we had nothing to gain in anything that was segregative, and they were — I was involved in this action, and as soon as it hit me, I had to rise and object to it.

There was a letter of reprimand in my folder now for speaking out for things which we believe, what we want for our children, and there is a — there would have been a — as far as administrative powers, we could have had another session where we talked about it, I grant them that, but I wasn't given the privilege of being involved in that session. So, yes, I speak up.

Q. Did this have to do with the Court order?

A. Yes, the impetus, yes.

Q. Can you give us approximately when this was?

A. It had to be 1973.

THE COURT: 19 what?

THE WITNESS: '73.

Q. Before you left the system did you make it the concern and point out the pattern of segregation that you were observing in the Central Office to the superintendent?

A. Yes, I was a systems man in spite of everything. I would not even think of expressing these concerns other places before I expressed them to my superior. I did it in a letter to him, indicating the same things, and I also, in the letter, said, soon, superintendent, I will no longer be an employee of the Board of Education, but I'm a citizen of Dayton. I have a responsibility, I think, to call the attention of the appropriate people to what I see as resegregative acts in our schools.

Q. But you did bring it then to the attention of the superintendent?

A. Yes.

Q. John Maxwell; is that correct?

A. Yes, that's correct.

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[R. IV. 535-539, Vol. 4] Q. Mr. Harewood, did you make a recommendation to the Dayton Board of Education and other members of the staff with reference to programming so far as it affected desegregation and can you give us the point in time when you made those recommendations?

A. 1973 and the years preceding that. For the three years I was assistant superintendent there was continuous discussions as to what type of programs would be effective that we could institute in our schools to address the problem of desegregation of pupils and also integration of them because the programs would be of such manner. I remember specifically that there was in the Patterson Cooperative High School a very popular program, and it suddenly outgrew the ability for that school to maintain that program, and the question was where should it be placed, in what high school. Should it be placed as part of that program so that it would still maintain its uniqueness, its ability to attract pupils and its ability to have the students spend two years in the school and in a classroom and then learn in industry along with the school program in order to complete their high school

education, and always our thought was, wouldn't it be an excellent opportunity to place part of that school on the west side of town and the rest of it down where it is so that it would be a natural desegregative process by the school itself.

In 1973 I was surprised and in 1974 I was surprised to learn that that program was placed on the east side of town, which is already white, already segregated too, and there had been a natural – in a school that was not any older than some of the schools in the west side, in which the program was discontinued, and subsequent to that there was another extra program placed further east at Kiser High School, a very attractive program which would by natural process of the students involved in this – you could have natural integration without the necessity of these other ways of doing it, which, of course, had to be imposed on us. Yes, I did at every opportunity.

Q. Did you recommend programs such as the Kiser program be located on the west side for a desegregative purpose?

A. Part of it, yes, part of the reason for that and for facilities and other things, yes.

Q. All right. And the decision, I take it, was made to place them on the east side in white areas; is that correct?

A. Yes.

Q. All right. Go ahead. I'm sorry. I didn't mean to – were you finished?

A. Which means then that the burden of proof is on the blacks to move there and for the whites to stay where they were.

Q. Has there been in Dayton during your experience as an administrator in the system and as a teacher, a pattern of resistance on the part of whites to attending schools in west Dayton which were black?

A. Yes.

Q. Has there been an influence or any influence on the actions or recommendations of administrators in the Dayton

system which took into account a desire to avoid sending whites into west Dayton?

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A. Repeat the question so I can follow it.

Q. Has there been an influence on the actions, on the recommendations of school administrators in regard to a variety of school policies that took into account or had built into it a reluctance to assign whites into west Dayton?

A. Yes.

Q. When you left or retired from the Dayton Public Schools, you did so voluntarily; is that so?

A. Yes.

Q. And you have remained a strong supporter of public education?

A. Yes.

Q. And at the present time are you active, sir, in community life?

A. Yes.

Q. And do you serve on a variety of organizations?

A. Yes.

Q. Can you give us some of those?

A. I'm president of the Senior Citizens Advisory Board. I'm secretary of the Boys Club, Board of Trustees. I'm a member of the Board of Trustees of the Red Cross in several communities for them. I'm on the Health Foundation of United Way, a member of that board, and I'm on the board for Family Children Services, a member of that board.

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[R. IV. 539, Vol. 4] Q. Mr. Harewood, you've recently or just testified about some programs that you discussed that were attractive programs that you felt would have drawing power to bring students together regardless of their race; isn't that right?

A. Yes.

Q. And I take it you are a believer and advocate of the magnet concept of attractive programs that will accomplish that end?

A. Yes, in the broad sense of magnet, appealing programs. See, I have to come from a different position because I think when they use magnet – every school should be a magnet as far as attracting youngsters there because of what happens with that school. So I do, but I do say that if the Board, administrative staff – and may I say this question came up before, and I hesitated not to get the answer which I think your Honor was asking for. On every board, on every administrative staff there must be someone who is a dreamer, who is not satisfied with the • • •

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[R. IV. 545-549, Vol. 4] Q. At any rate, there are two executive directors, Mr. Stolle and Mr. Scott, one of whom is white and one of whom is black, and those gentlemen report to both Mr. Feuer and Mr. Harrison, the black and white assistant assistant superintendents; isn't that your understanding?

A. They report to both of them?

Q. Yes.

A. That's an impossible administrative organizational structure.

Q. I'm not asking whether you agree with the organizational structure or not. I'm asking if that isn't the way it is to your knowledge.

A. That's right, yes.

Q. Okay. Now, you have made it abundantly clear in your testimony that you are in violent disagreement – well, let me not use the word violent. You have made it clear that you are opposed to what the School Board's policy has been of building schools where children are or where they are expected to be?

A. Yes, if that's the only criteria, yes.

Q. And you've given us three examples. The first was Miami-Chapel School. When it was built you were opposed to that site; correct?

A. Yes.

Q. And as far as Miami-Chapel is concerned, you didn't suggest any alternate site; did you?

A. No.

Q. And as far as that building was concerned, the schools that it relieved were crowded at the time it was built; isn't that true?

A. That's right.

Q. And a school was needed to take care of that overcrowding?

A. Um-hum.

Q. That's an affirmative? True?

A. Yes.

Q. And the school was placed in an area where it was needed to accommodate students or pupils that were residents of that area; isn't that true?

A. Yes.

Q. And, of course, the DeSoto-Bass housing project was already there for some years, in fact, before Miami-Chapel school was built; wasn't it?

A. Yes.

Q. Now, if we move to Jefferson Primary School, there you did suggest an alternative to where they placed the school; didn't you?

A. I didn't really make that suggestion. These were the sites they were discussing, and I wanted one which I thought would be the best at that time.

Q. And the Princeton Park site that you recommended was a site that was in essentially a white area; wasn't it?

A. At that time, yes.

Q. And at that time Jefferson School was located in a mixed area so that it was achieving a mixed student population; correct?

A. Um-hum.

Q. And if a boundary line had been drawn between the existing Jefferson Primary or Jefferson Elementary, I guess it was, and the Princeton Park site and you drew a higher boundary line between those two, you would end up with turning the old Jefferson into a predominantly black school and New Princeton Park into a predominantly white school, wouldn't you, unless you moved classes back and forth between the two?

A. Not necessarily classes, but I don't see the boundaries as being that important to what we're trying to do, and I don't see the original structure of the schools as far as K to 8 being concerned with consistent to what we are talking about in reference to that. There could have been another arrangement of grades to facilitate the thing, yes.

Q. But what the Board chose to do was to build a school that preserved the same grade structure they were using everywhere else and also preserve the racial mix of students that had been attending that school at that time; isn't that right?

A. At that time, yes.

Q. And the alternatives in all these respects were essentially to move students from wherever they were located to some other part of town; isn't that true?

A. The decision — I don't follow you. The decision that was made was to move students from where they were to some other part of town?

Q. No. What I'm asking you is: The alternative to the policy of building these schools or additions where the children were would have been to transport them to some other part of town in order to achieve an economic or racial mix or both?

A. Yes, and that's happened in some of the sites which were built.

Q. Now, if we look to the percentages of minority students in various schools in the Dayton System, as the school years go by from the mid-fifties on, what we see is a pattern in any number of schools where they started out with a relatively

small percentage of black students, and as the years went by ended up with an increasingly large percentage of black students; isn't that true?

A. In some mixed schools, yes.

Q. And except for schools that started out as predominantly black or predominantly white and remained the same, that is the only pattern that is really observable from the percentages in the Dayton schools, is some getting increasingly black over the years; isn't it?

A. The way it is set up, yes.

Q. And, of course, as the years went by and these schools were located, the black population of the City of Dayton or at least the black student population of the Dayton School District has risen from 19 to what, 54 percent now?

A. 54, yes.

• • •

Supreme Court, U. S.
FILED
MAR 3 1979
MICHAEL RODAK, JR. CLERK

APPENDIX

Exhibit Volume

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend,
Donna Brinkman, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

Petition For Certiorari Filed October 13, 1978
Certiorari Granted January 8, 1979

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1-Ex.

PLAINTIFFS' EXHIBIT 2A

ONE RACE SCHOOLS AND CLASSROOMS
In ONE RACE SCHOOLS, 1972-73

SCHOOLS		
Total Schools	68	100%
Schools with pupil racial composition 90% or more Black	22	32.3
Schools with pupil racial composition 90% or more White	25	36.8
Schools with pupil racial composition 90% or more Black or White	47	69.1

CLASSROOMS	#	% of Total
Total Classrooms	1,390	100%
Classrooms in schools with pupil racial compositions 90% or more Black	464	33.4
Classrooms in schools with pupil racial composition 90% or more White	647	46.6
Classrooms in schools with pupil racial composition 90% or more Black or White	1,110	80.0

Source: D. P. S. Enrollment Data and Division of Research Compilations

2-Ex.

PLAINTIFFS' EXHIBIT 2B

1951-52 OVERVIEW

Number Schools	47
Enrollment	34,948
Black Pupils	6,628
% Black Pupils	19.0
White Pupils	28,320
% White Pupils	81.0

ONE RACE SCHOOLS

Number 90+ Black Schools	4	90+ White Schools	34
No. of Black Students	3,602		0
% of Black Students	54.3		0
No. of White Students	0		23,514
% of White Students	0		83.0

Total Schools	38
Total Students	27,116
% of Total Students	77.6

Source: D. P. S. Enrollment Data

3-Ex.

PLAINTIFFS' EXHIBIT 2C

1963-64 OVERVIEW

based on Ohio Civil Rights Survey. (School Data)

Number Schools	64	(66)
Enrollment	57,361	(59,091)
Black Pupils	15,987	(18,377)
% Black Pupils	27.8	(31.1)
White Pupils	41,374	(40,714)
% White Pupils	68.9	(68.9)

ONE RACE SCHOOLS

Number 90+ Black Schools	13	90+ White Schools	43
No. of Black Students	12,665		361
% of Black Students	79.2		2.2
No. of White Students	391		37,544
% of White Students	0.9		90.7

Total Schools	57
Total Students	50,961
% of Total Students	88.8

Source: Ohio Civil Rights Survey

4-Ex.

PLAINTIFFS' EXHIBIT 2D

1971-1972 OVERVIEW

(Including Pre school Enrollment, as of October 1971)

Number Schools	69	
Enrollment	55,142	(Actual Enrollment - 53,936)
Black Pupils	23,544	
% Black Pupils	42.7	
White Pupils	31,598	
% White Pupils	57.3	

ONE RACE SCHOOLS

Number 90+ Black Schools	21	90+ White Schools	28
No. of Black Students	17,871		759
% of Black Students	75.9		3.2
No. of White Students	287		22,171
% of White Students	0.9		70.2

Total Schools	49
Total Students	41,088
% of Total Students	74.5

Source: D. P. S. Enrollment Data

5-Ex.

PLAINTIFFS' EXHIBIT 2E

SCHOOL SEGREGATION OVERVIEW

Black Schools

Of the 4 schools 90% or more black in 1951-52, all continue * 90% or more black in 1972-73.

Of the 13 schools 90% or more black in 1963-64, all remain 90% or more black in 1972-73.

Of the 21 schools 90% or more black in 1971-72, all remain 90% or more black in 1972-73.

White Schools

Of the 25 schools 90% or more white in 1972-73 all opened 90% or more white and, if open, were 90% or more white in 1971-1972, 1963-64, and 1951-52.

* In 1962 the Dunbar High School Building was converted to the McFarlane Elementary School, a new Dunbar High School opened, and the Willard and Garfield schools were closed and their pupils assigned to the McFarlane School. McFarlane opened with an all black student body and faculty; Dunbar opened with a virtually all black staff and pupil population and in 1963-64 enrolled a pupil population 99.6% black.

Source: D. P. S. Enrollment Data, Ohio Civil Rights Survey, D. P. S. Research Division Compilations.

6-Ex.

PLAINTIFFS' EXHIBIT

	School	3 or more Black Faculty (63-64)		6 or more Black Faculty	Pupil % Black****	6 or more Black Faculty	% Black Pupils
63-64	Roth*	----	----	11	53.5	50	92.3
	McFarlane**	----	----	43	99.6	48	99.9
	Carlson*	----	----	9	95.9	21	99.0
	Jackson Primary*	----	----	11	96.2	19	98.8
	Louise Troy*	----	----	22	99.8	20	100.0
	Westwood	----	----	20	94.7	42	99.4
68-69	Adams	----	----	------	--------	6	73.8
	Jefferson Elem.	----	----	------	--------	8	60.1
	Jefferson Prim.*	----	----	-------	--------	9	57.1
	Longfellow	----	----	-------	-------	7	42.3
	McNary*	----	----	-------	--------	17	99.4
	Residence Pk. El.	----	----	-------	---------	23	98.8
	Residence Pk.Pr.*	----	----	-------	---------	11	99.3

Every school which is 90% or more black, in the 1972-73 school year appears on this list.
No school which is 60% or more white in the 1972-73 school year appears on this list.
Of the 25 schools with less than 10% black enrollment, all had less than 6 black faculty in the 1968-69 school year, and every year theretofore. Only 4 had 3 - 5 black teachers, while 14 had 1 or no black teachers; in 1968-69 only 36 black teachers were assigned to these white schools.

* School not open until figures appear on the list.
** In 1962 the original Dunbar High School Building was converted into the McFarlane Elementary School and a new Dunbar High School opened; at the same time the Garfield and Willard Schools closed and their students absorbed in the McFarlane Elementary School.
*** Central closed.
****The Kennedy special school also had 6 black faculty.

Source: D. P. S. Personnel Data, D. P. S. Enrollment Data, Ohio Civil Rights Survey, D. P. S. Research Division Compilations.

Pltffs' Exhibit 3

7-Ex.

Plaintiffs' Exhibit 3

School	3 or more Black Faculty (63-64)		6 or more Black Faculty	Pupil % Black****	6 or more Black Faculty	% Black Pupils
63-64						
Roth*	----	----	11	53.5	50	92.3
McFarlane**	----	----	43	99.6	48	99.9
Carlson*	----	----	9	95.9	21	99.0
Jackson Primary*	----	----	11	96.2	19	98.8
Louise Troy*	----	----	22	99.8	20	100.0
Westwood	----	----	20	94.7	42	99.4
68-69						
Adams	----	----	------	--------	6	73.8
Jefferson Elem.	----	----	------	--------	8	60.1
Jefferson Prim.*	----	----	-------	--------	9	57.1
Longfellow	----	----	-------	-------	7	42.3
McNary*	----	----	-------	--------	----	99.4
Residence Pk. El.	----	----	-------	---------	23	98.8
Residence Pk.Pr.*	----	----	-------	---------	11	99.3

Every school which is 90% or more black, in the 1972-73 school year appears on this list.
No school which is 60% or more white in the 1972-73 school year appears on this list.
Of the 25 schools with less than 10% black enrollment, all had less than 6 black faculty in the 1968-69 school year, and every year theretofore. Only 4 had 3 - 5 black teachers, while 14 had 1 or no black teachers; in 1968-69 only 36 black teachers were assigned to these white schools.

* School not open until figures appear on the list.
** In 1962 the original Dunbar High School Building was converted into the McFarlane Elementary School and a new Dunbar High School opened; at the same time the Garfield and Willard Schools closed and their students absorbed in the McFarlane Elementary School.
*** Central closed.
****The Kennedy special school also had 6 black faculty.

Source: D. P. S. Personnel Data, D. P. S. Enrollment Data, Ohio Civil Rights Survey, D. P. S. Research Division Compilations.

RACIAL IDENTIFICATION OF BLACK SCHOOLS BY FACULTY ASSIGNMENT

School	1950-51 Black Faculty	1950-51 Pupil Racial Comp.	1951-52	1951-52	1953-54 3 or More Black	1953-54 (%51-52)	1956-57 3 or More	1956-57 (% 51-52)
Roth*	----	----	----	----	----	----	----	----
McFarlane*	----	----	----	----	----	----	----	----
Carlson	----	----	----	----	----	----	----	----
Jackson Primary	----	----	----	----	----	----	----	----
Louise Troy	----	----	----	----	----	----	----	----
Westwood	----	----	----	----	----	----	----	----
Adams	----	----	----	----	----	----	----	----
Jefferson Elem.	----	----	----	----	----	----	----	----
Jefferson Prim.*	----	----	----	----	----	----	----	----
Longfellow	----	----	----	----	----	----	----	----
McNary*	----	----	----	----	----	----	----	----
Residence Pk. El.	----	----	----	----	----	----	----	----
Residence Pk. Pr.*	----	----	----	----	----	----	----	----

63-64

66-69

9-Ex.

Plaintiffs' Exhibit 3

RACIAL IDENTIFICATION OF BLACK SCHOOLS BY FACULTY ASSIGNMENT

	School	1958-59 3 or more Black Faculty	1963-64 (63-64)	1963-64 6 or more Black Faculty	1963-64 Pupil % Black	1968-69 6 or more Black Faculty	1968-69 % Black Pupils
50-51	Dunbar	Black	(92.7**)	42 **	92.7**	62	99.3
	Garfield	Black	(Black)**	(Black)**	(Black)**	(Black)**	(Black)**
	Hogaman	Black	Black	37	100	40	99.5
	Willard	Black	(Black)**	(Black)**	(Black)**	(Black)**	(Black)**
51-52	Weaver	19	(98.8)	31	98.8	43	99.9
53-54	Edison	5	(80.0)	6	80.0	16	97.3
	Jackson	9	(98.5)	23	98.5	33	99.1
	Miami Chapel*	All but 3 black	(99.6)	27	99.6	29	99.9
56-57	Irving	10	(96.6)	17	96.6	26	99.0
	Highview	5	(82.0)	16	82.0	21	97.0
	Whittier	11	(95.6)	14	95.6	12	99.7
58-59	Roosevelt	10	(94.5)	22	94.5	68	100
	Central	4	((40.2))***	( )***	( )***	( )***	( )***
	Greene	5	(89.5)	11	89.5	21	96.8

10-Ex.

Plaintiffs' Exhibit 3

RACIAL IDENTIFICATION OF BLACK SCHOOLS BY FACULTY ASSIGNMENT

School	1950-51 Black Faculty	1950-51 Pupil Racial Comp.	1951-52	%51-52	1953-54 3 or More Black	(%51-52)	1956-57 3 or More	(% 51-52)
1950-51								
Dunbar	All Black	All Black	Black	Black	Black(48)	(Black)	Black	(Black)
Garfield	All Black	All Black	Black	Black	Black (16)	(Black)	Black	(Black)
Wegaman	All Black	All Black	Black	Black	Black (33)	(Black)	Black	(Black)
Willard	All Black	All Black	Black	Black	Black (22)	(Black)	Black	(Black)
51-52								
Weaver	----	----	1	67.6% B	3	(67.6)	13	(67.6)
53-54								
Edison	----	----	----	----	3	(43.0)	4	(43.0)
Jackson	----	----	----	----	3	(35.9)	7	(35.9)
Miami Chapel*	----	----	----	----	29 (Black)	All Black	All but 3 Black/All Black	
56-57								
Irving	----	----	----	----	----	----	4	(46.6)
Highview	----	----	----	----	----	----	5	(1.7)
Whittier	----	----	----	----	----	----	13	(29.9)
58-59								
Roosevelt	----	----	----	----	----	----	----	
Central	----	----	----	----	----	----	----	
Greene	----	----	----	----	----	----	----	

PLAINTIFFS' EXHIBIT 4

1950 to Date: RACIALLY IDENTIFIABLE CLASSROOMS OPENED (NEW SCHOOLS OR ADDITIONS) WHICH REMAIN PREDOMINANTLY BLACK OR PREDOMINANTLY WHITE IN PUPIL RACIAL COMPOSITION*

	School	Year Opened	AT OPENING % White Pupils	AT OPENING % White Faculty
Black	Dunbar	1962	less than 10 (7.3 in 1963)	5
	Carlson	1958	5	0
		1967	0.9	16
	Edison	1971	1.2	62
	Greene	1969	2.5	20
	Jackson Prim	1963	0.1	39
	MacFarlane	1954	0.0	0
		(1962)	0.0	0
	McNary	1964	0.0	35
	Miami Chapel	1953	0.0	15
		1954	0.0	7
	Residence Pk Prim	1966	(80 in 1967)	38.5
	Troy	1957	0.0	7
		1958	0.0	7
	Weaver	1950	30	100
		1954	less than 30	mostly
		1969	0.0	23
	Wogamon	1955	0.0	0
White	Belmont	1956	100	100
		1960	100	100
	Meadowdale H.S.	1960	100	100
		1967	99.1	94.1
	Patterson Co-op	1954	100	100
		1967	87.2	96.5
	Stivers	1966	99	95
	Wilbur Wright	1953	mostly	100
		1964	96.7	94
	Orville Wright	1952	100	100
		1955	100	100
		1966	100	100
	Allen Prim	1969	100	90
	Belle Haven	1954	100	100
		1957	100	100
		1958	100	100
		1964	100	100
	Brown	1950	100	100
		1953	100	100
	Cleveland	1956	100	100
		1967	100	100
	Eastmont	1955	100	100
		1958	100	100
		1967	100	97
	Fairview	1950	100	100
		1955	100	100
		1966	100	100
	Fort McKinley	1955	100	100
	Franklin	1961	100	100
		1967	100	97
	Gettysburg	1950	100	100
		1952	100	100
	Grant	1952	100	100
		1955	100	100
	Huffman	1967	98.5	93
	Kemp	1951	100	100
		1954	100	100
		1957	100	100
	Lawton	1951	100	100
		1954	100	100
		1957	100	100

School	Year Opened	AT OPENING % White Pupils	AT OPENING % White Faculty
Lincoln	1957	100	100
	1964	100	98.3
Loos	1954	100	100
	1967	98.8	96
Horace Mann	1954	100	100
	1957	100	100
Meadowdale El	1957	100	100
	1962	100	100
	1966	100	100
Patterson	1954	100	100
	1970	100	100
Ruskin	1955	100	100
	1966	(100 in 1967)	(100 in 1967)
Shiloh	1953	100	100
	1960	100	100
	1969	94	96
Shoup Mill	1958	100	100
Valerie	1966	100	100
Webster	1968	100	100

* The schools and classrooms which opened as racially identifiable black schools contain pupil populations over 95% black in the 1971-1972 school year. The schools and classrooms which opened as racially identifiable white schools contain 90% or more white pupil populations in 1971-1972 school year with the exception of Patterson Co-op (69.0% white), Stivers (87.7% white), Valerie (86.5% white), Gettysburg (85.5% white), and Belle Haven (89.7% white).

Source: D.P.S. Personnel Reports; Compilation of the D.P.S. Division of Research and D.P.S. Office of Equal Educational Opportunity; and the D.P.S. Building Schedule.

13-Ex.

PLAINTIFFS' EXHIBIT 5A

1963-64 New Black Teacher Employments/Placements

46
43 Full-time assignments
40 To schools with pupils racial composition 80% or more black

1964-65 New Black Teacher Employments/Placements

73
68 Full-time assignments
57 To schools with pupil racial composition 80% or more black

1968-69 Assignments of New and Transfer Teachers

	Schools with Predominantly White Enrollment	Schools with Predominantly Negro Enrollment	Total
Negro Teachers	40	95	135
White Teachers	223	64	287

Source: D.P.S. Personnel Reports; D.P.S. Superintendent's Compilations

14-Ex.

PLAINTIFFS' EXHIBIT 5D

RACIAL PATTERN IN THE ALLOCATION OF PUPILS AND FACULTY

Year	No. Black Teachers	No. White Teachers	Faculty Allocated To Pupil Populations 90% + Black	Faculty Allocated To Pupil Populations 90% + White
1950-51	----	----	All Black	No Black
	----	----	No White	All White
1963-64	415		304 (74.5%)	51 (12.7%)
		1616	151 (7.3%)	1290 (79.2%)
1968-69	746		633 (84.8%)	172 (9.3%)
		1847	172 (9.3%)	1299 (70.3%)

Source: D.P.S. Personnel Reports and Division of Research Compilations, Ohio Civil Rights Survey.

PLAINTIFFS' EXHIBIT 7

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF DAYTON, OHIO

WEDNESDAY – DECEMBER 8, 1971 – REGULAR MEETING

The following Resolution was introduced for adoption by Mr. Lucas, seconded by Mrs. Sterzer:

RESOLUTION SEEKING JOINT ACTION TO END SEGREGATION IN EDUCATION, HOUSING AND EMPLOYMENT IN THE METROPOLITAN DAYTON AREA

WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupils assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Day-

ton metropolitan area and other parts of Ohio; and the actions in inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

2. That this Board recognizes that past actions or inactions of the Board of Education and residential racial segregation are interdependent phenomena.

3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society.

5. That this Board views the racial and ethnic mix of the Dayton City School District and of the metropolitan area as assets; that this population, if reflected in each school, could itself contribute to people's learning from each other; and that, as a whole, the metropolitan area represents a nearly ideal cross section of the nation that could permit schools here to become a model of American democracy in action.

6. That this Board hereby invites and urges agencies of the federal, state, and local governments and organizations

of religious, business, labor, education, communications, civic service, and real estate to assist the Board in desegregation of Dayton schools and to pledge publicly their accelerated efforts to bring about desegregation in housing, education and employment throughout the Dayton metropolitan area.

7. That the Clerk of The Board be and hereby is directed to forward a true copy of this resolution to the following:

Governor of the State of Ohio
President of the State Board of Education
Speaker of the Ohio House of Representatives
President of the Ohio Senate
Montgomery County Members of the Ohio General Assembly and United States Congress
Montgomery County Commissioners
Dayton City Commissioners
Montgomery County Council of Governments
City Plan Board
Miami Valley Regional Planning Commission
Miami Valley Regional Transit Authority
Metropolitan Housing Authority

Apartment Owners Association
Area Progress Council
Assembly of Area Councils
Chairmen of Democratic and Republican Organizations
Community Affairs Committee
Congress of Representatives East Dayton Organizations
Dayton Advisory Council on Education
Dayton Area Board of Realtors
Dayton Area Chamber of Commerce
Dayton Area Junior Chamber of Commerce
Dayton Building Trades Council
Dayton Classroom Teachers Association

Dayton-Miami Valley AFL-CIO
Dayton Model Cities Planning Council, Inc.
Dayton Public Service Union
Dayton Urban League
Deans of Area Colleges of Education
Elementary Principals Association
Metropolitan Churches United
Miami Valley Consortium of Colleges and Universities
Montgomery County Community Action Agency
Montgomery County Council of PTAs
National Association for the Advancement of Colored People
Ohio Association of Public School Employees
Presidents Club
Secondary Principals Association
Southern Christian Leadership Conference

After introduction of the motion to adopt the Resolution, Mrs. Groff asked that the following statement be made a part of the Minutes:

"I feel that this resolution is beyond the jurisdiction of this Board because first of all it doesn't require a vote because it is in violation of this Board's present policy. Even though you sent out and stated that the policy we have on record referred to the election back in November 10, 1970, I would like to refute that because I have here a newspaper clipping quoting Dr. Carrell. It was when we were about to submit the policy on middle schools. On the question of middle schools, and I'd like to quote, "It has been alledged that there are 9 middle schools already chosen but not revealed by the Board. That they will be implemented over a weekend." Answer: "On both counts the answer is "no". First, I have not heard of any such proposal for 9 middle schools. I have no idea whether there will be 9 or 3 or 18. There is no proposal before the Board at this moment for any one of those figures. The Board adopted a policy some time ago

which said there would be 4 month's notice given to the public prior to the adoption of any significant policy decision. I feel that we still feel bound by that." Now, this is a new policy decision. This is the first time it has been before the Board. I feel this resolution is out of order. It's invalid because you are violating the Board's policy."

Upon completion of further discussion, it was moved by Mr. Ridenour, seconded by Mr. Hart, that action on the Resolution be tabled until the next regular meeting. Roll Call on the motion to table:

YEAS: Groff, Hart, Ridenour – 3
NAYS: Carrell, Seaman, Sterzer, and Lucas – 4

The motion to table was declared defeated.

Roll Call on original motion to adopt the Resolution:

YEAS: Carrell, Hart, Seaman, Sterzer, and Lucas – 5
NAYS: Groff, Ridenour – 2

The Resolution was declared adopted.

———

The following Resolution was introduced for adoption by Mr. Lucas, seconded by Mrs. Sterzer:

RESOLUTION ASKING FOR STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS

WHEREAS, The Committee of 75 has recommended school integration on a metropolitan basis, and

WHEREAS, the State of Ohio has responsibility and authority for the operation of public schools, and the State Board of Education has the duty to administer the laws relating generally to the operation of the schools, and

WHEREAS, the Ohio Attorney General has ruled that the State Board of Education has the authority to restrict fund-

ing in any school district in which said Board finds as a matter of fact that racial segregation exists,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby petitions the State of Ohio and the State Board of Education (a) to obtain from Ohio Civil Rights Commission, U. S. Office of Education and such other sources as it may deem useful, data on racial isolation of faculty, staffs and pupils within and among the several school districts as presently constituted in the metropolitan Dayton area; (b) to develop guidelines and criteria as may be necessary to assure an educationally and socially viable mix of pupils, within the socio-economic characteristics of the metropolitan area as a whole; (c) to require said districts to cooperate in preparing and implementing a plan for assignment of faculty, staffs and pupils in accordance with said guidelines and criteria, and (d) to assure adequate funding from state and district sources to continue the operation of the schools and the implementation of said plans throughout the period of transition and thereafter.
2. That said plans be developed by September 1, 1972 and fully implemented not later than September 1, 1973.
3. That the Clerk of the Board forward a true copy of this resolution to the Governor of the State of Ohio, the Speaker of the House of Representatives, the President of the Ohio Senate and the President of the State Board of Education.

After introduction of the motion to adopt the Resolution, Mrs. Groff asked that the following statement be made a part of the Minutes:

"Yes, I object to this resolution because it is also invalid and in violation of this Board's policy too. Also this is the

responsibility of the State Board of Education and the State Legislature and not this Board of Education to make these kinds of laws."

It was moved by Mr. Rinenour, seconded by Mr. Hart, that action on the Resolution be tabled. Roll Call on the motion to table:

YEAS: Groff, Hart, and Ridenour – 3
NAYS: Carrell, Seaman, Sterzer, and Lucas – 4

The motion to table was declared defeated.

Roll Call on original motion to adopt the Resolution:

YEAS: Carrell, Hart, Seaman, Sterzer, and Lucas – 5
NAYS: Groff and Ridenour – 2

The Resolution was declared adopted.

[PROPOSAL TO SUBMIT RESOUTION ASKING FOR STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS TO THE STATE BOARD OF EDUCATION]

It was moved by Mrs. Sterzer, seconded by Mr. Seaman, that the Resolution asking for State Assistance to Desegregate Public Schools be carried by a committee representative of the school district to the next State Board of Education meeting and presented at their public hearing. Roll Call:

YEAS: Carrell, Hart, Seaman, Sterzer, and Lucas – 5
NAYS: Groff and Ridenour – 2

The motion was declared approved.

Plaintiffs' Exhibit 7

The following Resolution was introduced for adoption by Mr. Lucas, seconded by Mrs. Sterzer:

RESOLUTION ORDERING THE RACIAL AND ECONOMIC INTEGRATION OF PUPILS IN THE DAYTON PUBLIC SCHOOLS

WHEREAS, the Board of Education of the Dayton City School District recognizes a moral and legal duty to provide quality non-segregated education for all students in the district, and,

WHEREAS, integrated education is vital to the achievement of quality education for all pupils, black and white, rich and poor, and,

WHEREAS, the Fourteenth amendment to the United States Constitution and the mandate of the United States Supreme Court in Brown v. Board of Education decision and subsequent court decisions place an affirmative duty to disestablish the segregated attendance patterns which result in whole or in part from its actions and inactions in order to equalize educational opportunity, and,

WHEREAS, segregated educational opportunity and unequal educational opportunities for minority and poor students now exist in the Dayton Public Schools, and

WHEREAS, this inequality exists as a result of the acts and omissions of this Board and preceding Boards in their decisions concerning the site selection of school buildings, size of school buildings, changes and adoption of school attendance boundaries, pupil assignment practices, faculty and staff hiring and assignment practices and,

WHEREAS, this Board has requested and received reports of findings and recommendations from the State Department of Education and the Committee of 75,

Plaintiffs' Exhibit 7

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton that it is the policy of this Board that each school shall enroll pupils in a manner which substantially reflects the racial and economic characteristics of the district as a whole. The Board recognizes that implementation of this policy requires departure from past practices and requires special planning to assure a smooth transition. The Board therefore directs:

1. That the superintendent in consultation with professional staff and the representatives of employee organizations, design and implement a mandatory program of in-service education involving all staff members to prepare staff for changes in enrollments and to develop an individualized, multi-ethnic curriculum in each school.

2. That Dayton Advisory Council on Education be requested to organize a Community Involvement Advisory Committee and a Lay Citizens Financial Review Committee to advise the superintendent during the course of planning and implementing integration programs, as recommended by the Committee of 75.

3. That the superintendent be and hereby is directed to develop and implement plans for the racial and economic integration of pupils using the following guidelines and criteria:

   a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

   b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

   c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

e. Desegregation is to be completed by September, 1972.

f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criteria in c. above.

g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy.

PLAINTIFFS' EXHIBIT 8

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF DAYTON, OHIO

MONDAY – JANUARY 3, 1972 –
REGULAR MEETING

[RESOLUTION FOR AUTHORIZATION TO ADVERTISE FOR BIDS FOR PURCHASE OF SCHOOL BUSSES]

It was moved by Mr. Lucas, seconded by Mr. Lawson, that the following Resolution be adopted:

RESOLUTION ON SCHOOL BUS PURCHASING

WHEREAS, it has been determined that it is necessary to purchase one hundred and thirty, sixty-six passenger conventional or seventy-three passenger transit type buses, and,

WHEREAS, it is recommended that school buses be purchased and operated by the Board of Education, and,

WHEREAS, plans and specifications have been prepared by the Business Department,

NOW, THEREFORE, BE IT RESOLVED that the Clerk-Treasurer be and hereby is authorized to advertise for bids to be opened and read publicly in accordance with the provisions of Section 3313.46, Revised Code and that they be tabulated and reported to the Board at its earliest meeting after the bid opening.

YEAS: Lawson, Lucas, and Sterzer – 3
NAYS: Goodwin, Groff, Ridenour, and Hart – 4

The Resolution was declared defeated.

[RESOLUTION REGARDING PREPARATION OF BUDGET]

It was moved by Mr. Goodwin, seconded by Mr. Ridenour, that in the preparation of the 1972 budget the Superintendent be directed by the Board to maintain line items in the same categories in order to give Board members direct comparison across the line, to maintain cost comparison from one year to another and with monthly reports to be made to the Board.

YEAS: Goodwin, Groff, Lawson, Ridenour, and Hart – 5
NAYS: Lucas – 1
ABSTENTION: Sterzer – 1

The motion was declared approved.

Plaintiffs' Exhibit 8

[RESOLUTION FOR AUDIT]

It was moved by Mr. Goodwin, seconded by Mrs. Groff, that the Clerk-Treasurer be authorized to seek bids immediateately for a complete audit of 1970 and 1971 income and expenditures of the Board of Education in each category relative to all items listed in the Appropriation Budget and amended budgets with the audit to be made according to the use of State and Federal guidelines.

Mr. Lucas stated that boards of education do not have statutory authority to employ independent auditors to audit their records.

The chair then requested that the motion be tabled and a ruling sought as to whether or not the action indicated in the motion could be legally carried out.

It was moved by Mr. Lucas, seconded by Mr. Lawson, that the matter be tabled in accordance with the request of President Hart.

YEAS: Goodwin, Groff, Lawson, Lucas, Ridenour, Stetzer, and Hart — 7

NAYS: None

The motion to table was declared approved.

[CONSIDERATION OF THREE RESOLUTIONS DRAFTED DECEMBER 8, 1971]

Mrs. Groff asked the Chair whether the motion to reconsider the three resolutions on integration could be brought up at this time. President Hart called up the motion on the vote to reconsider at the request of Mrs. Groff and then read the following statement:

"On December 8, 1971, there was presented to this board three resolutions by Mr. Lucas, to-wit:

Plaintiffs' Exhibit 8

1. Resolution Seeking Joint Action to End Segregation in Education, Housing and Employment in the Metropolitan Dayton Area.
2. Resolution Asking For State Assistance to Desegregate Public Schools.
3. Resolution Ordering The Racial and Economic Integration of Pupils in The Dayton Public Schools.

The motion was seconded and passed.

Thereafter Mr. Hart moved, seconded by Mrs. Groff, that the above resolutions offered by Mr. Lucas, (titles being read) be taken up at the next meeting, that the questions be reconsidered and entered upon the minutes of the December 8, 1971, meeting.

Mr. Lucas ruled that the motion to reconsider was out of order.

Later Mr. Lucas, publicly, withdrew this ruling. The chair concurs that Mr. Lucas' ruling was in itself out of order for the reason that — whether a point of order is raised or not, all actions in violation of the by-laws are null and void automatically. Our by-laws provides for reconsideration and for the use of Robert's Rules of Order which also provides for motions to reconsider and enter.

The December 8, 1971 meeting then by unanimous vote was recessed to a definite date and never reconvened.

On December 30, 1971, an assemblage of various board members was held and a purported vote taken on the reconsideration heretofore entered on the minutes of the December 8, 1971 meeting. This was NOT convened as a special meeting as the notice did not indicate that the call was for a special meeting and did not list reconsideration or any agenda which under our rules of order must be done. Secondly, it was not signed by members calling the meeting.

Thirdly, the notice merely recited action taken at a previous assemblage of December 16, 1971.

We must not examine the proceedings of the December 16, 1971, meeting. The December 16, 1971 meeting was a special meeting called at the instance and under the signature of two board members. Under the statutes and under our own rules and regulations it must be served on each member at least two days prior to the date of the called meeting. One member, Mr. Hart, did not receive the notice within the required time. A copy of that notice and the envelope within which it was sent shows that the special delivery department of the posal service did not receive this notice until 15 December 1971, which made it physically impossible to serve the notice at least two days prior to the meeting of December 16, 1971.

The attorney general has held and courts have decided that the proceedings of a school board are invalid where the required notice is not given and the member not receiving notice is absent.

The chair therefore rules that:

1. The ruling of Mr. Lucas ruling the motion to reconsider and enter made at the December 8, 1971 meeting to be out of order was itself out of order.

2. The proceedings of the December 16, 1971 meeting are invalid and this includes all votes taken at this meeting including the vote to reconsider and the vote setting a regular meeting for December 30, 1971.

3. That you cannot set a legal meeting at an illegal meeting.

4. Since the last legal meeting was recessed until January 3, 1972 the only meeting that could be called after recess was a special meeting.

5. That the December 30, 1971 meeting was invalid since it was convened as a regular meeting at a special meeting which itself was invalid and no call of a special meeting was made in accordance with the statutes governing special meetings.

6. That proceedings and votes taken at the December 30, 1971 meeting are invalid because of the illegality of the December 30, 1971 meeting.

7. That the Clerk of this board should confer with the president of this board to determine which actions this board would deem it necessary to confirm or ratify.

8. That the motion to reconsider, having never been acted upon, is now before this board under the category of new business and the question to reconsider may now be called up."

I call up the motion on the vote to reconsider the three resolutions which has been pending before this Board since the December 8, 1971 Regular Board Meeting."

Mr. Lucas asked that the record show that the action of the Chair at the January 3, 1972 meeting is invalid because the Board that dealt with this matter as a parliamentary procedure had adjourned sine die and this Board has no jurisdiction whatsoever.

It was moved by Mrs. Groff, seconded by Mr. Ridenour, that the motion to reconsider the three resolutions of December 8, 1971 on integration be brought before the Board for vote.

YEAS: Goodwin, Groff, Ridenour, and Hart – 4

NAYS: Lucas – 1

PASS: Lawson and Sterzer – 2

The motion to reconsider the three resolutions was declared approved.

———

Plaintiffs' Exhibit 8

[RECONSIDERATION OF RESOLUTION SEEKING JOINT ACTION TO END SEGREGATION IN EDUCATION, HOUSING AND EMPLOYMENT IN THE METROPOLITAN DAYTON AREA]

The Clerk read the Resolution at the request of the Chair:

WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions and inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

2. That this Board recognizes that past actions or inactions of the Board of Education and residential racial segregation are interdependent phenomena.

3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by

Plaintiffs' Exhibit 8

the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multiethnic society.

5. That this Board views the racial and ethnic mix of the Dayton City School District and of the metropolitan area as assets; that this population, if reflected in each school, could itself contribute to people's learning from each other; and that, as a whole, the metropolitan area represents a nearly ideal cross section of the nation that could permit schools here to become a model of American democracy in action.

6. That this Board hereby invites and urges agencies of the federal, state, and local governments and organizations of religious, business, labor, education, communications, civic service, and real estate to assist the Board in desegregation of Dayton schools and to pledge publicly their accelerated efforts to bring about desegregation in housing, education and employment throughout the Dayton metropolitan area.

7. The the Clerk of the Board be and hereby is directed to forward a true copy of this resolution to the following:

   Area Board of Education Presidents
   Governor of the State of Ohio

President of the State Board of Education
Speaker of the Ohio House of Representatives
President of the Ohio Senate
Montgomery County Members of the Ohio General Assembly and United States Congress
Montgomery County Commissioners
Dayton City Commissioners
Montgomery County Council of Governments
City Plan Board
Miami Valley Regional Planning Commission
Miami Valley Regional Transit Authority
Metropolitan Housing Authority
Apartment Owners Association
Area Progress Council
Assembly of Area Councils
Chairmen of Democratic and Republican Organizations
Community Affairs Committee
Congress of Representative East Dayton Organizations
Dayton Advisory Council on Education
Dayton Area Board of Realtors
Dayton Area Chamber of Commerce
Dayton Area Junior Chamber of Commerce
Dayton Building Trades Council
Dayton Classroom Teachers Association
Dayton-Miami Valley AFL-CIO
Dayton Model Cities Planning Council, Inc.
Dayton Public Service Union
Dayton Urban League
Deans of Area Colleges of Education
Elementary Principals Association
Metropolitan Churches United
Miami Valley Consortium of Colleges and Universities
Montgomery County Community Action Agency

Montgomery County Council of PTAs
National Association for the Advancement of Colored People
Ohio Association of Public School Employees
Presidents Club
Secondary Principals Association
Southern Christian Leadership Conference
Jewish Community Council

Prior to voting on the Resolution the Chair announced that a "Yes" vote would support the Resolution and a "Nay" vote would be one to defeat the Resolution.

YEAS: Lawson, Lucas, and Sterzer – 3
NAYS: Goodwin, Groff, Ridenour, and Hart – 4

The Resolution was declared defeated.

Mr. Lucas left the meeting at this point.

[RECONSIDERATION OF RESOLUTION ASKING STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS]

The Clerk read the Resolution at the request of the Chair:

RESOLUTION ASKING FOR STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS

WHEREAS, The Committee of 75 has recommended school integration on a metropolitan basis, and

WHEREAS, the State of Ohio has responsibility and authority for the operation of public schools, and the State Board of Education has the duty to administer the laws relating generally to the operation of the schools, and

WHEREAS, the Ohio Attorney General has ruled that the State Board of Education has the authority to restrict funding in any school district in which said Board finds as a matter of fact that racial segregation exists,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby petitions the State of Ohio and the State Board of Education (a) to obtain from Ohio Civil Rights Commission, U. S. Office of Education and such other sources as it may deem useful, data on racial isolation of faculty, staffs and pupils within and among the several school districts as presently constituted in the metropolitan Dayton area; (b) to develop guidelines and criteria as may be necessary to assure an educationally and socially viable mix of pupils, within the socio-economic characteristics of the metropolitan area as a whole; (c) to require said districts to cooperate in preparing and implementing a plan for assignment of faculty, staffs and pupils in accordance with said guidelines and criteria, and (d) to assure adequate funding from state and district sources to continue the operation of the schools and the implementation of said plans throughout the period of transition and thereafter.

2. That said plans be developed by September 1, 1972 and fully implemented no later than September 1, 1973.

3. That the Clerk of the Board forward a true copy of this resolution to the Governor of the State of Ohio, the Speaker of the House of Representatives, the President of the Ohio Senate and the President of the State Board of Education.

Prior to voting on the Resolution the Chair announced that a "Yes" vote would support the Resolution and a "No" vote would be one to defeat the Resolution.

YEAS: Lawson and Sterzer
NAYS: Goodwin, Groff, Ridenour, and Hart

The Resolution was declared defeated.

———

[RECONSIDERATION OF RESOLUTION ORDERING THE RACIAL AND ECONOMIC INTEGRATION OF PUPILS IN THE DAYTON PUBLIC SCHOOLS]

The Clerk read the Resolution at the request of the Chair:

RESOLUTION ORDERING THE RACIAL AND ECONOMIC INTEGRATION OF PUPILS IN THE DAYTON PUBLIC SCHOOLS

WHEREAS, the Board of Education of the Dayton City School District recognizes a moral and legal duty to provide quality non-segregated education for all students in the district, and,

WHEREAS, integrated education is vital to the achievement of quality education for all pupils, black and white, rich and poor, and,

WHEREAS, the Fourteenth amendment to the United States Constitution and the mandate of the United States Supreme Court in Brown v. Board of Education decision and subsequent court decisions place an affirmative duty to disestablish the segregated attendance patterns which result in whole or in part from its actions and inactions in order to equalize educational opportunity, and,

WHEREAS, segregated educational opportunity and unequal educational opportunities for minority and poor students now exist in the Dayton Public Schools, and

WHEREAS, this inequality exists as a result of the acts and omissions of this Board and preceding Boards in their decisions concerning the site selection of school buildings, size of school buildings, changes and adoption of school attendance boundaries, pupil assignment practices, faculty and staff hiring and assignment practices and,

WHEREAS, this Board has requested and received reports of findings and recommendations from the State Department of Education and the Committee of 75,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton that it is the policy of this Board that each school shall enroll pupils in a manner which substantially reflects the racial and economic characteristics of the district as a whole. The Board recognizes that implementation of this policy requires departure from past practices and requires special planning to assure a smooth transition. The Board therefore directs:

1. That the superintendent in consultation with professional staff and the representatives of employee organizations, design and implement a mandatory program of in-service education involving all staff members to prepare staff for changes in enrollments and to develop an individualized, multi-ethnic curriculum in each school.

2. That Dayton Advisory Council on Education be requested to organize a Community Involvement Advisory Committee and a Lay Citizens Financial Review Committee to advice the superintendent during the course of planning and implementing integration programs, as recommended by the Committee of 75.

3. That the superintendent be and hereby is directed to develop and implement plans for the racial and economic integration of pupils using the following guidelines and criteria:

   a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

   b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

   c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

   d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

   e. Desegregation is to be completed by September, 1972.

   f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criteria in c. above.

   g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy.

4. That to the maximum feasible extent consistent with this policy statement, recommendations of the Committee of 75, are hereby adopted and may be used in planning and implementing school integration.

5. That the superintendent report on progress and problems concerning implementation of this policy at least every sixty days and that a program for continuous evaluation throughout the phases of implementation be developed by July 31, 1972.

6. That the superintendent prepare applications for supplementary financial assistance from state, federal and other sources that may become available to improve the quality of education and achieve the goals of the Committee of 75 report.

Prior to voting on the Resolution the Chair announced that a "Yes" vote would support the Resolution and a "No" vote would be one to defeat the Resolution.

YEAS: Lawson and Sterzer – 2
NAYS: Goodwin, Groff, Ridenour, and Hart – 4

The Resolution was declared defeated.

Plaintiffs' Exhibit 8

[STATEMENT AND RULING OF THE CHAIR]

At this time President Hart made the following statement and ruling:

"Gentlemen, since this board has voted to reconsider these questions and has defeated them, the Chair now rules that under the form to reconsider and enter upon the minutes, that this is all that must be done to stop execution upon motions or actions of this Board because that to permit otherwise would deprive the board of its right to reconsider.

Since it is possible that there may have been a premature execution of these questions, the chair further rules:

1. That the superintendent under his signature communicate with all persons and agencies named in said motions advising them of the premature execution thereof, requesting a withdrawal of said premature communications and countermanding the communications that were premature where the premature communication cannot be withdrawn; and that communications upon said motions that were made prior to this date are premature and invalid."

• • • •

Mr. Lucas returned to the meeting at this point.

[STATEMENT OF MRS. GROFF]

The Chair recognized Mrs. Groff who made the following statement:

Mr. President, Members of the Board, and Citizens:

Quoting from THE CREATIVE SOCIETY by Ronald Reagan, "We have the privilege of living on the only island of freedom that is left in the whole world." There is no other place in the world to go. We stand together and defend freedom here or it is gone. We must work together and take a

Plaintiffs' Exhibit 8

stand. If we fail, I think we face telling our children and our grandchildren what it was we found more precious, or more important than freedom.

"Freedom is a fragile thing and is never more than one generation away from extinction. It comes only once to a people. Those who have had it and lost it have never known it again."

The Dayton Schools are the people's business, and every man, woman and child becomes a shareholder with the first penny of tax paid. The most meaningful words of the Constitution are the first three, "We the people."

Therefore, the time has come for the Board to recognize that the schools belong to the people and that the people have a right to know all the facts about their schools.

The time has come for the Board to decide whether we can afford everything we think of simply because we think of it. The time has come to run a check to see if all the services we have taken away from the people or the innovations we have provided are just goodies dreamed up for their supposed betterment. The time has come to balance outgo to income, instead of always doing it the other way around.

What we need is a system of an objective evaluation before changes are implemented. The people should have the opportunity to give their opinion on supposed changes and the Board act on the decisions of the people.

Supporting and implementing the basic principles that have made America great is not turning back the clock but it is taking the dream that has made this country progress, updating it, and making it practical for the 20th century. A High Quality Education which will insure that every child in the Dayton School System can reach his full potential so that he can become a responsible contributing member of society is the goal of this Board of Education.

With these thoughts in mind I would like to present the following three resolutions."

The following Resolution was introduced by Mrs. Groff, seconded by Mr. Ridenour:

RESOLUTION ORDERING DEVELOPMENT OF PLANS THAT ARE WITHIN THE FINANCIAL ABILITY OF THE CITY SCHOOL DISTRICT OF DAYTON FOR IMPROVEMENT OF QUALITY OF EDUCATION.

WHEREAS, the present enrollment patterns of the Dayton Public Schools are not related to the policies or decisions of the Board of Education;

WHEREAS, the racial and economic imbalance that exists in the Dayton Public Schools is not a result of any act of discrimination on the part of the Dayton Board of Education;

WHEREAS, the Constitution of the United States does not require a Board of Education to balance racial concentrations in schools where such racial concentrations are not the result of any act of the Board of Education;

WHEREAS, the Dayton City Schools have been found to be in compliance with HEW rules and regulations as evidenced by the statement of Mr. James Mancini, a compliance review attorney in the Civil Rights Division of HEW;

WHEREAS, no massive movement of pupils back and forth across the City or County could be accomplished without an expenditure of thousands and thousands of dollars;

WHEREAS, the reasons given by the administrators of the Dayton School System for the 10.5 mill additional levy did not include an expenditure for bussing and for other transportation of pupils for the purpose of eliminating economic and/or racial segregation of pupils, nor do the additional State appropriations require this;

WHEREAS, this Board of Education has consistently supported the concept of neighborhood schools;

WHEREAS, the Freedom of Enrollment policy of the Dayton City School District has been considered a successful venture;

WHEREAS, this Board of Education is concerned about all the children of the Dayton City School District and is consistently searching for ways and means to improve the quality of education offered to them and;

WHEREAS, this Board of Education has adopted various plans and approaches toward improvement of the quality of the education offered to the children of Dayton;

NOW, THEREFORE, BE IT RESOLVED, by the Board of Education of the City School District of Dayton that the Superintendent and his staff submit to this Board by the end of the 1971-72 school term a feasibility report and plan that is within the financial ability of the City School District of Dayton, Ohio, providing for improvement in the quality of education offered at each of the schools within this district.

It was moved by Mr. Lucas, seconded by Mrs. Sterzer, that action on the Resolution be tabled.

Roll Call on the Motion to Table:

YEAS: Lawson, Lucas, and Sterzer – 3
NAYS: Goodwin, Groff, Ridenour, and Hart – 4

The motion to table action on the Resolution was declared defeated.

• • • •

Plaintiffs' Exhibit 8

Roll Call on the Resolution:

YEAS: Goodwin, Groff, Ridenour, and Hart – 4
NAYS: Lawson, Lucas, and Sterzer – 3

The Resolution was declared adopted.

The following Resolution was introduced by Mrs. Groff, seconded by Mr. Goodwin:

RESOLUTION ORDERING DEVELOPMENT OF FEASIBILITY REPORTS AND PLANS FOR PROVIDING FREE TRANSPORTATION OF STUDENTS PARTICIPATING IN THE FREEDOM OF ENROLLMENT PROGRAM IN THE DAYTON PUBLIC SCHOOLS

WHEREAS, the present enrollment patterns of the Dayton Public Schools are not related to the policies or decisions of the Board of Education;

WHEREAS, the racial and economic imbalance that exists in the Dayton Public Schools is not a result of any act of discrimination on the part of the Dayton Board of Education;

WHEREAS, the Constitution of the United States does not require a Board of Education to balance racial concentrations in schools where such racial concentrations are not the result of any act of the Board of Education;

WHEREAS, the Dayton City Schools have been found to be in compliance with HEW rules and regulations as evidenced by the statement of Mrs. James Mancini, a compliance review attorney in the Civil Rights Division of HEW;

WHEREAS, no massive movement of pupils back and forth across the City or County could be accomplished without an expenditure of thousands and thousands of dollars;

Plaintiffs' Exhibit 8

WHEREAS, the reasons given by the administrators of the Dayton School System for the 10.5 mill additional levy did not include an expenditure for bussing and for other transportation of pupils for the purpose of eliminating economic and/or racial segregation of pupils, nor do the additional State appropriations require this;

WHEREAS, this Board of Education has consistently supported the concept of neighborhood schools;

WHEREAS, the Freedom of Enrollment policy of the Dayton School District has been considered a successful venture;

WHEREAS, this Board of Education is concerned about all the children of the Dayton City School District and is consistently searching for ways and means to improve the quality of education offered to them and;

WHEREAS, this Board of Education has adopted various plans and approaches toward improvement of the quality of the education offered to the children of Dayton;

NOW, THEREFORE, BE IT RESOLVED, by the Board of Education of the City School District of Dayton that the Freedom of Enrollment policy of the Dayton Public Schools shall be continued with the exception that the Superintendent and his staff be, and hereby are, directed to develop and submit to this Board of Education before the start of the second semester of the 1971-72 school year a feasibility report and plan providing for the free transportation of the students participating in such program.

It was moved by Mr. Lucas, seconded by Mr. Lawson, that the action on the Resolution be tabled.

Roll Call on the Motion to Table:

YEAS: Lawson, Lucas, and Sterzer – 3
NAYS: Goodwin, Groff, Ridenour, and Hart – 4

The motion to table was declared defeated.

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Roll Call on the Resolution:

YEAS: Goodwin, Groff, Ridenour, and Hart – 4
NAYS: Lawson, Lucas, and Sterzer – 3

The Resolution was declared adopted.

The following Resolution was introduced by Mrs. Groff, seconded by Mr. Goodwin.

RESOLUTION AUTHORIZING ARRANGEMENT OF STUDENT TRANSFERS BETWEEN DAYTON CITY SCHOOL DISTRICTS AND SCHOOL DISTRICTS WITHIN THE DAYTON METROPOLITAN AREA.

WHEREAS, the present enrollment patterns of the Dayton Public Schools are not related on the policies or decisions of the Board of Education;

WHEREAS, the racial and economic imbalance that exists in the Dayton Public Schools is not a result of any act of discrimination on the part of the Dayton Board of Education;

WHEREAS, the Constitution of the United States does not require a Board of Education to balance racial concentrations in schools where such racial concentrations are not the result of any act of the Board of Education;

WHEREAS, the Dayton City Schools have been found to be in compliance with HEW rules and regulations as evidenced by the statement of Mr. James Mancini, a compliance review attorney in the Civil Rights Division of HEW;

WHEREAS, no massive movement of pupils back and forth across the City or County could be accomplished without an expenditure of thousands and thousands of dollars;

WHEREAS, the reasons given by the administrators of the Dayton School System for the 10.5 mill additional levy did

not include an expenditure for bussing and for other transportation of pupils for the purpose of eliminating economic and/or racial segregation of pupils, nor do the additional State appropriations require this;

WHEREAS, this Board of Education has consistently supported the concept of neighborhood schools;

WHEREAS, the Freedom of Enrollment policy of the Dayton City School District has been considered a successful venture;

WHEREAS, this Board of Education is concerned about all the children of the Dayton City School District and is consistently searching for ways and means to improve the quality of education offered to them and;

WHEREAS, this Board of Education has adopted various plans and approaches toward improvement of the quality of the education offered to the children of Dayton;

NOW, THEREFORE, BE IT RESOLVED,

1. That with the concurrence of one or more of the school districts within the Dayton Metropolitan area and following the Freedom of Enrollment guidelines as amended of the Dayton City School District, the Superintendent is authorized to arrange for the payment of tuition for students requesting tuition-paid transfers to schools outside of the Dayton City School District providing, however, (a) that the transfers are arranged during the summer for the succeeding school year, (b) that the entire sum for all such tuition payments paid by the Dayton Board of Education shall not exceed the amount of tuition received by the Board from other school districts during the preceding calendar year and (c) that such transfer shall improve the racial balance of the public schools of the Dayton City School District. It is further suggested that this policy be implemented for 1972-73 school year.

2. That with the concurrence of one or more of the school districts within the Dayton metropolitan area and following the Freedom of Enrollment guidelines as amended of the Dayton City School District the Superintendent, upon mutual exchange of students or upon payment of tuition, is authorized to accept any student from an outlying school district within this District provided that the acceptance of such student at a school within this district shall improve the racial balance of such school.

It was moved by Mr. Lucas, seconded by Mr. Lawson, that action on the Resolution be tabled.

Roll Call on the Motion to Table:

YEAS: Lawson and Lucas – 2
NAYS: Goodwin, Groff, Ridenour, Sterzer, and Hart – 5

The motion to table was declared defeated.

• • • •

Roll Call on the Resolution:

YEAS: Goodwin, Groff, Ridenour, and Hart – 4
NAYS: Lawson and Lucas – 2
ABSTENTION: Sterzer – 1

Mrs. Sterzer indicated that she abstained from voting because she felt Mrs. Groff's resolution was not valid since it fell outside the jurisdiction of the Board.

The Resolution was declared adopted.

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[INSTRUCTIONS TO CLERK AND SUPERINTENDENT OF SCHOOLS]

The following motion was introduced by Mrs. Groff, seconded by Mr. Ridenour:

Mr. President:

I move that the Clerk of the Board be and hereby is directed to forward true copies of the three Resolutions to all persons and agencies who received copies of the tentative package of three Resolutions on Racial and Economic Rations, of the December 8, 1971 Board meeting. He shall inform them by separate letter of the three new resolutions, namely: on IMPROVEMENT OF QUALITY OF EDUCATION, on DEVELOPMENT OF PLANS FOR PROVIDING FREE TRANSPORTATION OF STUDENTS PARTICIPATING IN THE FREEDOM OF ENROLLMENT PROGRAM IN THE DAYTON PUBLIC SCHOOLS, and on AUTHORIZING ARRANGEMENT OF STUDENT TRANSFERS BETWEEN THE DAYTON SCHOOL DISTRICT AND SCHOOL DISTRICTS WITHIN THE DAYTON METROPOLITAN AREA. He shall inform them by separate letter of the three resolutions as adopted, and forward a copy of the letter to all members of the Board of Education.

I move also, that the Superintendent is directed to publish in the next issue of SCHOOL DAY Mrs. Groff's introductory remarks and the three resolutions as adopted by the Dayton Board of Education on January 3, 1972.

YEAS: Goodwin, Groff, Ridenour, and Lucas – 4
NAYS: Lawson, Lucas, and Sterzer – 3

The motion was declared approved.

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PLAINTIFFS' EXHIBIT 9

REPORT OF THE COMMITTEE OF 75

Advisory Committee To The Board of Education
To Reduce Racial Isolation and Improve
Educational Opportunities

Dayton Board of Education • 1971

THE COMMITTEE: ITS ORIGIN AND ACTIVITIES

The Committee of 75 was organized to advise the Dayton Board of Education how best to deal with racial and economic isolation in the public schools and improve the quality of education therein.

Origin

It originated in a resolution adopted by the Dayton Board of Education on April 29, 1971.

Resolution to Seek Assistance To Reduce Racial Isolation and Improve Educational Opportunities

WHEREAS, THE Dayton Board of Education recognizes that unequal educational opportunities for minority students now exist, and

WHEREAS, current resources available to the Board have been fully used to extend learning opportunities and are now stretched to their limit, and

WHEREAS, the Congress is considering the Emergency School Assistance Program that may supplement other funds for improving education and reducing racial and economic isolation,

NOW, THEREFORE BE IT RESOLVED that the superintendent of schools be authorized and directed to request the assistance of the State Department of Education, Office of Equal Educational Opportunities, to provide technical assistance for the development and submission to the Board of alternative plans for reducing racial and economic isolation of pupils and improving educational opportunities in the Dayton Public Schools and for developing proposals for outside funding to implement the same, subject to the approval of the Board.

BE IT FURTHER RESOLVED that the President of the Board, in consultation with the Board, appoint a broadly representative committee to evaluate and advise the Board on plans that are developed pursuant to this resolution; and to communicate with and seek the cooperation of civic, governmental, higher educational, religious, communications, labor, business and other segments of the community in the Dayton area regarding such plans.

Meeting first on August 30, 1971, at Frigidaire's Moraine plant auditorium on Springboro Pike, the committee received the following charge from Leo A. Lucas, Board President:

The Charge To
The Advisory Committee of the Board of Education
To Reduce Racial Isolation and Improve
Educational Opportunities

We, the members of the Dayton Board of Education, are deeply grateful for the presence of each of you here this evening. This is an historical event – one that is even more historical than the decision of the Dayton Board of Education of the 1930's to construct the original Dunbar High School.

We recognize, and the statistical data substantiates, the fact that unequal educational opportunities for the poor and black students now exist in the Dayton School District. The Board of Education has gone on record by setting quality integrated education as its goal. We have admitted that the district is guilty of procedures which have led to the racial isolation of school children.

It is this committee's responsibility to establish the evaluation elements to be applied to a developed plan or plans and advise the Dayton Board of Education accordingly. We do hope that you would set up guidelines and/or methods by which the community will become meaningfully involved.

You are an arm of the Dayton Board of Education with the task of supplying input to the Board. It remains the responsibility of the Board of Education to make official approval of your input. We feel very strongly that the establishment of this committee is not an attempt to abdicate its responsibility or delegate its authority, but rather an attempt to utilize the enrichment of citizen participation. It is hoped that the school councils, and organized groups of school-oriented citizens of the school district, will be an avenue you may use for additional participation.

If there be a fear that you are here to architect a master plan for "busing" — "t'ain't true." You are here in an attempt to supply your input of the ingredients for excellency to any plan that the administration and/or consultants may recommend. It is our sincere hope that when a plan is set for implementation, it should be that one or the one that embraces the wishes of the citizens of the Dayton School District and not one imposed by federal, state or court mandate.

Again, we are happy to have your view joined with us to place our input on what may be called The Dayton

Peoples Plan for the elimination of racial and economic isolation among the pupils of the Dayton School District.

Now acting by the authority invested in me as President of the Dayton Board of Education, I hereby officially appoint this committee and also name Dr. Irvin W. Batdorf as Chairman, and request that the termination date be set at December 1, 1971.

At this meeting an address was brought by Dr. William Self, Superintendent of the Charlotte-Mecklenburg school system in North Carolina, setting forth the process of integration accomplished there under order of the courts. Mrs. Virginia McNeal was elected vice-chairman of the Committee and Dr. Irvin W. Batdorf appointed as chairman. To address the problem of racial and economic isolation in each of the areas considered as integral to the operation of the public schools the committee was divided into nine subcommittees, the names of whose personnel appear on pages ii, iii, iv of this report. As listed there the committees include not only the original 75 members but also eleven students who were added to the committee later at the invitation of President Leo Lucas of the Board, in response to growing feeling that more student input was needed.

As a basic document to spark deliberations, each subcommittee member was given a copy of the publication, *Recommendations of the State Department of Education to the Dayton Board of Education* (2). This paper had been sent to each member of the Dayton Board of Education on June 7, 1971, and a copy is filed at the Board offices where the records of the committee of 75 are kept. Pages 13-16 of this paper list ten alternate responses to racial imbalance in the Dayton schools which the State Department did not consider adequate. On pages 16-30, the State Department recommended an eleventh proposal, on the basis of which the subcommittees began their deliberations. This latter recommendation included the substance of a paper by Dr. Charles Glatt

entitled "Parameters and the Future," which was printed in a report made to the Dayton Board of Education on December 15, 1970 bearing the title *School Integration* (14). This report also was made available to each member of the committee together with whatever materials each subcommittee found pertinent to its work. Members also profited much from the advice and wisdom of the schools central office staff through consultants assigned to each subcommittee.

PRIORITIES FOR THE PRESENT

What We Felt

Nothing can replace the experiences we had working with each other because the problem we had tackled forced us to put ourselves on the line. There was literally no place to hide. That's the way it is when you take integration seriously. And that's why something must be said about what we felt, painful and embarrassing as that is.

As we moved ahead, week after week and month after month, short as our time was together, the level of our encounters deepened until, at the end, without our knowing what lay below the surface or expecting what finally did happen, the depth of our relationship to each other suddenly stood revealed. We knew who we were once and for all, and each of us knew what he in particular had to do. I as a white man had to explain to other white men what it's like. The blacks had done their part long since and now it was my turn.

Through the words and the endless explanations came the fear of our black brethren that they were being sold down the river once again. For all of them – without exception – this was an old, old story. As one of them said, "Before I came to Ohio my oldest children were doing all right, but here in Dayton the younger ones are being crippled by segregation. I'm determined to change all that one way or another. We've suffered too long."

When we could not believe we were hearing rightly another black man pounded the nail one more time. "You know," he asked, "what the unemployment rate is for Dayton? – 6 per cent for everyone else and 20 per cent for ghetto blacks. You know how many more blacks you'll find at the Lebanon Correctional Facility? – 4 out of 5. And education – segregated education – is largely to blame."

So it was whitey's turn to be angy, frustrated, utterly down! "Suppose," said one, "we demand integration now. Our report won't have a chance! Better half a loaf than none at all. I can predict just what will happen. They'll never give us a hearing. Better to be Machiavelli than go tilting at windmills with Don Quixote."

So we were honest and shocked by turns until one white man said, "I'm not sure what will happen politically but so long as one black life is being snuffed out I'll go along with pressing for integration now. Hereafter I'm not going to simply listen to what everyone says, I'm ready to take a stand and be a leader, to do what I feel compelled to do and to say what I think ought to happen!"

So some of us switched roles and we all went off to lick our wounds and make what reaccommodations we could with ourselves – with "intellectual honesty" and "practicality" and "confrontation" and "gut feeling." But ever thereafter we all knew – both black and white – that we could not explain to our fellow Daytonians what integration and segregation are all about apart from this embarrassing reference to the deep valley we had walked together.

What We Must Do

Having been "through the mill" of confrontation with each other we accept these priorities for ourselves, and recommend their adoption by the Board and the citizenry of Dayton.

1. Segregated education, because it perpetuates and condones economic and racial isolation, is both illegal and inferior.

2. The school children of Dayton have suffered far too long under the crippling handicaps imposed by racial and economic isolation.
3. We must resolve now as a total community to end inferior segregated education once for all.
4. Time is running out. Unless we act now the divisions generated by segregation will destroy us. Unless we act now court orders may impose upon us what all of us will regret.
5. Initiative in the struggle against segregated education belongs to the Dayton Board of Education. We cannot wait for housing and job patterns to change while we defy the law of the land.
6. To lift the plague of segregated education in Dayton immediate appeal must be addressed to the school systems surrounding Dayton as well as to the appropriate state and national agencies involved.
7. Desegregation is not enough. To end racial and economic isolation we must not rest until we have achieved true integration, until the differing ethnic and racial groups among us are able to live side by side in mutual respect.
8. The personal cost of achieving such true integration will be high because to achieve such integration we must persist in dialogue until the differences that divide us have been resolved. We can no longer allow the fear of busing stifle such dialogue.
9. The financial cost of true integration will also be high. At least 1 per cent of the current budget, exclusive of federal and state grants, should be allocated to this sector.
10. Integrated quality education requires constant vigilance. We must not only develop support systems to undergird every group involved in the changes proposed but we must nurture these groups by con-

tinuing attention to curricula, buildings, and in-service training.

What Is Involved

To Impose Racial Isolation on Public Education is Illegal

The 14th amendment to the Constitution of the United States guarantees "equal protection" under law to every citizen, and the Supreme Court has interpreted this provision to mean that "separate educational facilities are inherently unequal" ("Brown v. Board of Education of Topeka" in *Race and Place A Legal History of the Neighborhood School*, by Meyer Weinberg pp. 4, 14, 31, 55, 76, 92, 96) (8). In this 1954 decision the Supreme Court said of black children:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Statement of The United States Commission on Civil Rights concerning the "Statement by the President on Elementary and Secondary School Desegregation", May 15, 1970, page 9 (7) is the source of the above statement.

Quality Education

In the spirit of this declaration and in the light of Title VI of the 1964 Civil Rights Act, which put the executive and legislative branches of government solidly behind the judiciary, we as a committee go one step further. *We believe that to impose racial and economic isolation on public education is not only illegal but detrimental to the quality of that education, for both white and black, for both advantaged and disadvantaged.*

Where such isolation breeds alienation, quality must suffer. The twin concerns that created our committee are inseparable.

Quality education cannot thrive where racial and economic isolation of whatever sort divides the children and citizens of one community from those of another.

The reason for this is plain. The quality of any educational system depends upon how well it prepares today's children for tomorrow's world. Tomorrow's world will be integrated and any child who has not been educationally prepared to deal with this world will be severely handicapped. He will receive a distorted view of a multi-racial society that will leave him incapable of dealing with the world as it is. Therefore we believe segregated education to be inherently inferior for ALL children, whether white or black, advantaged or disadvantaged.

Urgency of Action

Since it is clear that segregated education is both illegal and inferior, *it is also clear that the Dayton Board of Education must address itself to this problem since latest reports indicate that 75 per cent of our school children attend schools that are 90 per cent racially isolated.* The Board has already indicated its intention to do so through the resolution that created our committee of 75, and through many statements and actions leading up to that resolution of April 29, 1971.

We now recommend that the Board should not wait for this problem to be solved otherwise, as by a change in attitudes toward public housing patterns or by a non-compliance finding from H.E.W. Without waiting for other cities to take the lead, we recommend that our Board strengthen the impetus initiated by the appointment of our committee to solve this problem by all means within its power now.

The urgency of such action is made clear both by the poor record of Dayton in dealing with racial and economic isolation and by the court actions already taken to force school integration in cities other than Dayton.

Poor record. Where segregated education is concerned the City of Dayton has not been quick to act. In 1926 the State

Supreme Court acted to require the Dayton Ohio School Board to cease forcing Negro children to occupy one part of the school building with their own entrances and exists (*Race and Place,* page 38) (8). The situation was equally stringent in 1966 when the Mayor's Ad Hoc Riot Study devoted two pages of its *Preliminary Report* to a detailed description of the deterioration then being suffered by Dayton's west side schools in buildings, services, equipment, teaching and morale (pages 7-8). It is little wonder then that in 1967 the education task force committee, working under the Dayton Committee on Civil Rights in cooperation with the Ohio State Advisory Committee to the U. S. Commission on Civil Rights took as the focus of its concern "the education of the deprived ghettoized child" and particularly "his inability to learn the required and necessary tasks through the traditional methods practiced by our institutions" (page 2 of *Dayton's Call To Action. Recommendations for the Solution of Human Problems in the Community*) (16). While there was some progress then and the spirit of the community was aroused, our findings five years later indicate that there is still much to be done. One measure of this is a report issued just recently, (November 1971) by the Dayton Public Opinion Center, entitled *How Dayton Views the Public Schools* (4). The last paragraph on page 3 reads as follows:

> Racial conflicts in public schools have been the subject of much newspaper and television coverage in the past few years. Yet even with this type of adverse publicity, more people in the Dayton School District felt that school integration has improved relations between blacks and whites than believed that it has hindered them. A total of 48 per cent believed it was improved and 39 per cent felt that it has worked against interracial relations.

In this attitude there is perhaps some ray of hope. On the other hand the last part of this same paragraph continues:

> People were about evenly divided about whether school

> integration has improved the quality of education received by black students (45 per cent saying it has and 43 per cent saying it has not). Over one-half, however, felt that integration has not improved white students' education. Only 35 per cent responded that it has. (See Table 7).

One can see from this last quotation that we in Dayton still have a long way to go.

Integration in Other Cities

Beyond Dayton we may quote from a recent paper, referred to before in this report, *Statement of the United States Commission on Civil Rights* (7) concerning the "Statement by the President on Elementary and Secondary School Desegregation," issued on May 15, 1970. On page 3 we read:

> The school systems of New Rochelle, New York; South Holland, Illinois; Pasadena and Los Angeles, California; and Pontiac, Michigan, are among those which have been found by the court to have practiced deliberate school segregation in violation of the Fourteenth Amendment. There is no doubt that there are many more instances of school segregation resulting from conscious decisions of school officials than the relative handful that have come to the attention of the courts.

We may now add to this list the school situations in Detroit and Indianapolis. In the former case

> U. S. District Court Judge Stephan J. Roth declared that what appears to be *de facto* segregation in the Detroit School System is actually *de jure* and must be abolished. (*Time*, October 11, 1971, page 23).

In the Pontiac case the U. S. Supreme Court recently refused to "tamper with this city's court-ordered school busing program" (*Journal-Herald*, Wednesday, October 27, 1971).

We in Dayton should note that court orders have hit cities both larger than ours (Los Angeles and San Francisco) and smaller (New Rochelle, Pontiac, Pasadena and South Holland). We should also note from the report quoted that there may be other cities in non-compliance not yet confronted by the courts.

Of particular interest is a letter written by superintendent of schools for the San Francisco Unified School District, Dr. Thomas A. Shaheen, on the eve of the desegregation of that city's elementary schools. Although not under court order San Francisco met the same problems that face all segregated school systems in the process of complying with the law.

> These will not be easy days. What happens to us, not only in the next few weeks, but throughout the year, is tremendously important for San Francisco. I who have a deep commitment, as you know, to the value of desegregation do have many concerns, many uncertainties, about what the year holds. I am sure that there are many of you who have the same deep commitment to desegregation as I do.
>
> I am sure, also, that there are some of you who are still searching in your own minds the extent to which you have a commitment to desegregation.
>
> Yes, I know that some of you do not believe that desegregation is in the best interest of the schools of San Francisco, nor in the best interest of America. I feel that you have reached this position after very careful study of the issues, of the values, of this country, and your professional obligations to the children.
>
> I respect your convictions. Whatever your personal feelings, and mine, we have the obligation to show our students and our community the importance and value of compliance with the law. We can be models at this time of what it means to live in a democracy.
>
> The stakes and the issues which lie before us are high. It goes, I think, to the very heart of whether public school education can continue in this country of ours. . . . (11)

In the light of these facts, both at home and abroad, we believe that the Dayton School Board should address itself to the racial imbalance of segregated education not simply to insure respect for law and order and provide quality education but also to secure that justice and human understanding without which law and order are meaningless. We ask how we can urge law and order on our children and defy the supreme law of the land as interpreted by the Supreme Court. Not long ago the Kerner report was brought up to date by a Federal Commission appointed by President Nixon. It declared that the division of our nation into two armed camps, which was noted two years ago, still exists, only with greater impact now than then. In 1966 over 95 per cent of our nation's black people lived in the North and the majority of these in the city. Now that percentage is greater than ever with whites fleeing to the suburbs and the inner city left black and bankrupt. Under these conditions the "peaceful co-existence" spoken of in the Kerner Report will be increasingly impossible unless strong action is taken. Our time is short! The opposite of integration is disintegration.

Responsibility Beyond Dayton

Since quality integrated education should be available to all, equality of opportunity should be accessible to all children of the Dayton Metropolitan area as also to all children of the State of Ohio. The time is upon us when the old boundary lines are disappearing and there will be no place to run from the changes that must be made. Therefore, the Dayton Board of Education should begin immediately to:

1. Initiate action with the Boards of Education of suburban communities surrounding Dayton, looking toward possible consolidation.
2. Initiate action with the State Board of Education looking toward possible consolidation.

3. Initiate action to insure that dollars expended per student be equalized on a statewide basis. This would require the development of state-established minimal standards and some form of state evaluation.
4. Begin the necessary political action in the state legislature for the above changes to take place through the rule of law.
5. Check with the United States Office of Education concerning possible forms of assistance in pursuing this endeavor.
6. Begin preparing the people of Dayton educationally for the changes which are surely to come.

Attacking Isolation

Racial and economic isolation may be attacked broadly and basically on two fronts: The reassignment of students and the preparation of these students to work, share, learn, and live with each other in a productive way.

Concerning the reassignment of students. Various methods should be analyzed, evaluated and tabulated in order from least traumatic to most. We recognize that under present conditions of racial and economic isolation in Dayton some form of busing would be necessary either to implement or supplement whatever other methods are employed to effect school desegregation.

In no case should we be content with piecemeal desegregation since this procedure tends to focus tensions, fears and hostilities upon specific schools and this in turn creates problems that militate against true integration. At the same time careful attention must be given to the fears arising from distance, safety and busing "out" of the "neighborhood" area.

Preserving the human being. Whatever combination of methods is used, the Board must not allow people to be de-

humanized in the process, i.e., to be treated simply and solely as bodies to be pushed around. Let it be noted that our committee is concerned with true integration not simple desegregation. There is a vast difference between desegregation and integration. Desegregation breaks apart old patterns of isolation and division but integration aims to bring people together in mutual respect rather than mere mutual proximity.

We must emphasize, however, that integration is not intended to erase all identifiable ethnic and racial characteristics nor to homogenize them toward bland conformity. The resulting loss of spiritual and cultural heritage would be immense. Integration does not require that we all copy one another; only that we respect one another, learn from one another and move together toward fruitful achievement contributing to the common good. Individual rights must be protected and expanded but no one can justly claim for himself what he will deny to others.

Continuous curriculum change. Reassignment will be ineffective unless curricula are periodically reshaped, the teaching staff held to strict accountability for productive performance and the facilities used continually reassessed in the light of changing needs. Only so can quality education be made available to all children on an equal basis.

The detailed reports of each subcommittee in the chapters that follow should make this abundantly clear.

Concerning the preparation of people. All the people involved in reassignment should be given some part in the decision-making process by which it unfolds. People excluded from the social processes that affect them are thereby dehumanized and alienated, whether black or white, rich or poor, teacher, students or community residents.

Support systems. All the people involved in reassignment should be undergirded by well thought out *support systems* to make the readjustments called for, whether those affected

be students, teachers, parents, custodians, paraprofessionals, central office staff, clerical staff or community residents.

Funding. The magnitude of such preparation should be acknowledged by the provision of adequate *funds.* Ideals wither without the resources to implement them in a realistic way. At the same time we must remember that while action may be costly, inaction may ultimately be more costly.

Planned immediate action. We recognize that time for change in Dayton has run out! We must act now. But the action we take must be *well planned* to give the persons involved a true opportunity to adjust themselves to the demands placed upon them.

Evaluation. Whatever the process, it must be *evaluated* periodically by a representative group reflecting the entire community to make certain that no segments are given priority at the expense of others.

Summary. The presence and magnitude of the problem before us needs to be recognized by all the citizens of Dayton. Quality integrated education can help stop the flight to the suburbs, break the cycle of poor education, and the lack of job skills which handicap the minorities. The cost of this type of education will be small in relation to the total benefits society will reap.

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PLAINTIFF'S EXHIBIT No. 10

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DESEGREGATION STUDY
DAYTON PUBLIC SCHOOLS

By Doctor Gordon Foster

January 3, 1972

For several years the Dayton School Board, the Dayton Superintendent of Schools, professional school associations, various citizens advisory groups representing the Dayton community, and cooperating governmental agencies have been formulating policies and initiating efforts to equalize opportunities for education in the Dayton schools and improve the learning experience for all children who attend the Dayton system. The elimination of racial imbalance in the schools, the impartial employment and assignment of all staff personnel, a more relevant curriculum, broader community involvement, and an end to racial isolation and discrimination were the major goals to which these groups expressed commitment.

In August of 1967 the Board issued a "Statement of Intent" establishing directions and policies to effectuate these major goals. A "Freedom of Enrollment" policy was initiated in September of 1969. The Dayton Advisory Council on Education was established to advise the superintendent on planning and implementing desegregation efforts. In 1971 the "Committee of 75" was organized as an advisory body to deal with racial isolation in the schools. Outside assistance was arranged through such agencies as the Ohio State Department of Education, the Equal Educational Opportunities Office of the U.S. Office of Education, and the Office of Civil Rights. The Dayton Classroom Teachers Association and the Dayton Principals Association lent support.

All of these activities came to "a head" in a sense on December 8, 1971 when the Dayton Board adopted a series of resolutions committing itself to an integrated system in the fall of 1972. Specifically, it directed the superintendent to develop and implement plans for the racial and economic integration of pupils – by September 1, 1972.

This study is a direct result of the resolutions by the Board on December 8, 1971. Data for the study were furnished by the superintendent and his staff for the most part. The consultant team spent a total of 11 days on site and expedited the completion of the study to the maximum extent possible for two reasons: the study team has commitments beginning in January, 1972, for desegregation studies in other major cities; and the Dayton system will need to proceed with its planning for desegregation in the fall of 1972 as quickly as it can.

It should be noted that adequate pupil locater maps were not available by race or grade level so that recommended changes in pupil assignments had to be estimated on the basis of present elementary attendance areas. Since estimates for September, 1972 assignments also have to be made on the basis of 1971-72 figures, a margin of error must be allowed. It should also be noted that in most desegregation studies the local school administrative staff is by far the most knowledgeable body in terms of finalizing pupil assignments and developing transportation arrangements. The job of the outside expert is primarily to demonstrate possibilities and facilitate ideas and policies for a framework within which the local staff can complete the task.

In developing the Dayton plan an attempt was made to follow these general guidelines:

(1) Equitable treatment of both majority and minority pupils

(2) A plan that would meet constitutional requirements (*Brown* v. *Topeka* and *Swann* v. *Charlotte-Mecklenburg*)

(3) Economic feasibility: transportation would be kept to a minimum in getting the schools desegregated

(4) Safety factors would be observed

(5) The concept of schools as "community centers" would be maintained where possible

(6) Available classroom space and building facilities would be used to best advantage

In summary, the Dayton Board of Education and the Dayton Superintendent are to be commended for their leadership and wisdom in deciding to meet constructively the problems of racial and economic isolation in the Dayton schools. It is hoped that this study will provide the impetus to achieve their goals in September, 1972.

CURRENT STATUS OF DESEGREGATION IN DAYTON

The Dayton system has made considerable headway in certain aspects of school desegregation, not so much in others. A summary review will be given here of the current status of desegregation efforts with regard to the school faculties, classified personnel, administrative personnel, pupil assignment, and community and staff involvement.

SCHOOL FACULTIES

Desegregation of school faculties in Dayton has been accomplished under an agreement reached with the Office of Civil Rights (HEW) in 1971. The pattern of assignment has followed basically the court's ruling in *Montgomery* v. *Carr* which indicated that faculties should be assigned to each school in substantially the same racial proportion currently in effect at the elementary and secondary levels in the total system. Thus, 31 per cent of the faculty at X high school would be black if there were approximately 31 per cent blacks employed by the total system as secondary faculty personnel.

According to available data, district assignment and recruit-

ment practices were seeking to maintain this pattern and, at the same time, attempting to improve faculty racial balance in employing new staff.

CLASSIFIED PERSONNEL

"Classified personnel," also known as "noncertificated personnel," for the purposes of this report refers to clerical, custodial, and food service job classifications in the Dayton Public Schools. Information released by the Superintendent's Office states the degree of desegregation of classified personnel as of mid-1971.

(1) While 33 per cent of the clerical personnel within the school system are black, 665 of them are working in predominantly black schools.

(2) While 47 per cent of the custodial personnel within the school system are black, 82 per cent of them are employed in predominantly black schools.

(3) While 39 per cent of the food service personnel within the total school system are black, 83 per cent of them are located in predominantly black schools.

It would appear that blacks hold the lesser-ranked and lower-paying jobs among classified personnel positions. The tendency to find blacks in classified posts stationed in predominantly black schools is common to urban schools; typically, people prefer to work close to home.

ADMINISTRATIVE PERSONNEL

The black-white ratio for administrative personnel as of 1970-71 is portrayed by the following table.

Plaintiffs' Exhibit 10

Administrative Posts: Racial Balance, 1970-1971

Position	*White*	*Black*	*% Black*
Central Office[a]	73	29	27.1
Building Principals	51	18	26.1
Assistant Principals	25	17	40.5
(Principals & Assts.)	(76)	(35)	(31.5)
Total Administrative[b]	176	72	29.0

[a] Data taken from Dayton Public Schools "School Integration," a report dated December, 1970, Table 2, p. 17. Under "Central Office" this table excludes personnel classified as "resource teacher," "psychologist," or "child accountant" although including them would not affect the proportion.

[b] All administrators, including those excluded under the "Central Office" category were included.

The 1971-72 comparable data were not available at the time this report was being prepared. It is understood, however, that the proportion of blacks in administrative posts has increased somewhat in the past year.

PUPIL ASSIGNMENT, 1971-72

Pupil assignment data are given in Table I for grades K-5, in Table 2 for grades 6-8, and in Table 3 for grades 9-12. There were 51 school buildings housing regular elementary (K-5) programs; eight of these were really double buildings occupying the same site so that there were only 47 elementary attendance zones. A total of 26,380 pupils were assigned at this level with a racial pattern of 44.4 per cent black.

There were five middle schools and 34 additional elementary

Plaintiffs' Exhibit 10

buildings housing grades 6-8. Pupils in these grades totalled 12,298, and 44.9 per cent of them were black.

There were 11 high schools. Patterson Co-op drew pupils from the entire system so that there were only 10 high school attendance zones. Grades 9-12 included 16,464 students, 38.3 per cent of whom were black.

A summary of student enrollment by race in 1971-72 is given in Table 4A, and a summary of attendance areas in Table 4B.

These data indicate the existence of severe racial isolation in pupil assignment patterns. If the criterion of "90 per cent or more pupils being of one race" is used to define a racially identifiable or racially segregated school then 40 of the elementary schools were segregated insofar as pupils in grades K-5 were concerned. Three middle schools and 7 high schools were also segregated under this criterion.

If the criterion of "more than 15 percent above or below the average racial distribution" is used to define a segregated school — a guideline that has been used in some cities and states — only five Dayton schools would be nonsegregated: Fairport, Hawthorne, McGuffey, Colonel White, and Patterson Co-op.

The characteristics of economic isolation, or a concentration of pupils in schools by similar family income levels, are equally clear although the data are not as readily available. Using Title 1 (ESEA) eligibility as an indicator of income levels (Table 4C), it is apparent that a high concentration of low-income families is assigned to schools in the southern and central parts of the district.

COMMUNITY AND STAFF INVOLVEMENT

On August 30, 1971, at its first meeting, the Committee of 75 heard the president of the Board comment that data showed "unequal educational opportunities for the poor and black students now exist in the Dayton School District . . ./and/that

the district is guilty of procedures which have led to the racial isolation of school children."

Community involvement to correct this situation was encouraged by the Committee of 75's recognition of the fact that desegregation – the physical mix of races in enrollment patterns – was not enough; that integration – living and working "side by side in mutual respect" was the necessary goal for the Dayton school community.

Other examples of good communications existing between the schools and the community are the passage of school millage funds, the activities of the Dayton Advisory Council on Education (DACE), the various programs with the Office of Economic Opportunity and other community agencies, plus the large amount of coverage given schools in the news media.

Communication has also occurred with employee groups through involvement of faculty and staff on committees, in interracial workshops, and in various efforts to complete faculty and staff desegregation successfully. The program of Equal Educational Opportunities in the Dayton Schools is to be commended for its efforts in this regard in working with staff, with students, and with the community.

RECOMMENDATIONS FOR DESEGREGATION OF PUPILS

The Board in its December 8 resolutions rescinded attendance zones as presently constituted, effective September 1, 1971 and asked for pupil assignment to schools by race and family income characteristics substantially proportionate to the total system pattern.

MIDDLE SCHOOLS

The first step in fulfilling this resolution would logically be the completion of the middle school program already stated.

Recommendation 1. – All pupils in grades 6-8 should be assigned to middle schools in September, 1972.

This will require establishing 10 present elementary buildings as middle schools. Based on data obtained from the administrative staff, on data in the recent Ohio State *Educational Facilities Evaluation*, and on team site visits and discussion the following schools were recommended as new middle schools:

Jane Addams	Lincoln
Belmont Elementary	Meadowdale
Brown	Webster
Gettysburg	Westwood
Grant	Wogaman

These schools are located around the district in such a way as to complement the five existing middle schools. Even though the buildings cannot be prepared as proper middle school fafilities for several years, the change should be made immediately.

Dayton's adoption of the "middle school" concept is educationally sound and, coordinated with the direction toward a unitary school system, can achieve two goals. One, education for pre-adolescents and early adolescents can be improved. Two, the resultant rezoning of attendance areas around middle schools can aid desegregation.

The middle school as a concept is in many ways comparable to junior high schools. They are intended to provide an orderly transition in learning experiences from the homeroom, one-teacher organization of the elementary school to the platoon system of the high school with the student's being expected to exert more self-direction. Many "middle schools" originated because a junior high school had to take in the sixth grade (or possibly the fifth and sixth) to relieve crowded conditions in elementary schools. Sometimes this caused a review of the curriculum.

Table 1

Student Enrollment by School and Race
Pre-Kindergarten and Grades K-5
Dayton Public Schools, 1971-72

	Pre-Kdg.		Kdg.		Gr. 1-5		Sp. Ed.		Total		Total	% BI
	B	W	B	W	B	W	B	W	B	W		
Jane Addams	33	5	41	8	214	67	10	2	298	82	380	78.4
Allen	0	0	0	58	3	377	0	0	3	435	438	0.7
Belle Haven	0	0	7	101	39	473	0	0	46	574	620	7.4
Belmont Elementary	0	0	0	72	0	287	0	0	0	359	359	0.0
Brown	0	0	0	129	2	582	0	0	2	711	713	0.3
Carlson	0	0	51	1	333	1	0	0	384	2	386	99.5
Cleveland	0	0	0	152	1	725	0	0	1	877	878	0.1
Drexel	0	0	1	74	23	335	1	7	25	416	441	5.7
Eastmont	0	0	0	63	0	313	0	0	0	376	376	0.0
Edison	89	0	103	1	436	1	15	0	643	2	645	99.7
Emerson	8	57	8	88	22	411	0	15	38	551	587	6.1
Fairport	0	0	58	102	274	398	2	7	334	507	841	39.7
Fairview	0	0	6	65	19	382	0	4	25	451	476	5.3
Ft. McKinley	0	0	0	50	5	247	0	0	5	297	302	1.7
Franklin	0	0	0	80	0	534	0	8	0	632	632	0.0
Gardendale	32	5	43	19	211	68	0	0	286	110	396	72.2
Gettysburg	0	0	6	47	39	274	0	0	45	321	366	12.3
Grant	0	0	0	89	3	358	0	0	3	447	450	0.7
Greene	47	1	42	1	463	18	7	0	559	20	579	96.5
Hawthorne	23	13	15	41	61	176	0	0	99	230	329	30.1
Hickorydale	0	0	10	47	34	194	0	8	44	249	293	15.0
Highview	40	0	73	0	349	10	15	0	477	10	487	97.9
Huffman	0	40	0	71	1	505	0	9	1	625	626	0.2
Irving	78	1	102	0	576	3	20	0	776	4	780	99.5
Jackson Elementary	0	0	0	0	291	1	10	0	301	1	302	99.7

72-Ex.
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Table 1

Student Enrollment by School and Race
Pre-Kindergarten and Grades K-5
Dayton Public Schools, 1971-72

	Pre-Kdg.		Kdg.		Gr. 1-5		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W	B	W	B	W		
Jackson Primary	138	0	136	0	397	6	0	0	671	6	677	99.1
Jefferson Elementary	0	0	0	0	762	75	23	0	785	75	860	91.3
Jefferson Primary	0	0	100	35	443	51	0	0	633	86	719	88.0
Kemp	0	0	6	79	35	444	0	4	41	527	568	7.2
Lewton	0	0	0	54	1	252	0	7	1	313	314	0.3
Lincoln	0	0	1	113	2	516	2	8	5	637	642	0.8
Loos	0	0	4	65	27	317	1	4	32	386	418	7.7
Horace Mann	0	0	0	35	0	154	0	0	0	189	189	0.0
McGuffey	39	34	35	69	151	315	0	7	225	415	640	35.2
McNary	40	0	69	0	316	0	8	0	433	0	433	100.0
Meadowdale	0	0	0	42	2	256	0	0	2	298	300	6.7
Miami Chapel	127	0	0	0	354	0	0	0	481	0	481	100.0
Patterson Elementary	0	39	0	50	1	341	0	0	1	430	431	0.2
Residence Park Elementary	0	0	0	0	286	1	8	0	294	1	295	99.7
Residence Park Primary	0	0	102	0	346	1	0	0	448	1	449	99.8
Ruskin	0	37	0	77	0	436	0	15	0	565	565	0.0
Shiloh	0	0	0	61	5	304	0	0	5	365	370	1.4
Shoup Mill	0	0	0	20	1	116	0	0	1	136	137	0.7
Louise Troy	0	0	143	0	447	2	0	0	590	2	592	99.7
Valerie	0	0	6	18	25	116	0	3	31	187	218	14.2
Van Cleve	11	23	15	113	87	511	0	0	113	647	760	14.9
Washington	16	16	16	66	59	451	1	9	92	542	634	14.5
Weaver	129	0	114	0	734	3	21	0	998	3	1001	99.7
Webster	0	0	0	60	1	273	0	4	1	337	338	0.3
Westwood	54	0	107	0	686	5	17	0	764	5	769	99.3

73-Ex.
Plaintiffs' Exhibit 10

Table 1

Student Enrollment by School and Race
Pre-Kindergarten and Grades K-5
Dayton Public Schools, 1971-72

	Pre-Kdg.		Kdg.		Gr. 1-5		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W	B	W	B	W		
Wogaman	43	0	87	0	499	1	14	0	643	1	644	99.8
Gorman							12	89	12	89	101	11.9
Kennedy							24	129	24	129	153	15.7
TOTAL BLACK	945		1597		8968		211		11719			
TOTAL WHITE		271		2296		11755		339		14661		
TOTAL ENROLLMENT		1216		3893		20721		550		26380	26380	44.4

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Table 2

Student Enrollment by School and Race
Grades 6-8
Dayton Public Schools, 1971-72

	Gr. 6-8		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W		
Jane Addams	167	23	7	1	174	24	193	87.9
Allen	1	190	0	0	1	190	191	0.5
Belle Haven	56	318	0	0	56	318	374	15.0
Belmont Elementary	0	183	0	0	0	183	183	0.0
Brown	9	345	0	0	9	345	354	2.5
Carlson	187	1	0	0	187	1	188	99.5
Cleveland	3	365	0	0	3	365	368	0.8
Cornell Hgts M.S.	567	217	0	0	567	217	784	72.3
Drexel	14	142	0	4	14	146	160	8.7
Eastmont	0	231	0	0	0	231	231	0.0
Emerson	10	210	0	9	10	219	229	4.4
Fairview	30	233	0	2	30	235	265	11.3
Ft. MacKinley	2	147	0	0	2	147	149	1.3
Garfieldale	114	43	0	0	114	43	157	72.6
Gettysburg	42	190	0	0	42	190	232	18.1
Grant	1	198	0	0	1	198	199	0.5
Hickorydale	23	112	0	4	23	116	139	16.5
Highview	209	5	9	0	218	5	223	97.8
Huffman	0	268	0	5	0	273	273	0.0
Jackson Elementary	407	2	14	1	421	3	424	99.3
Lawton	1	152	0	4	1	156	157	0.6
Lincoln	5	314	0	5	5	319	324	1.5
Longfellow M.S.	485	325	24	4	509	329	838	60.7
Loos	6	205	0	2	6	207	213	2.8
Horace Mann	2	93	0	0	2	93	95	2.1

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Table 2

Student Enrollment by School and Race
Grades 6-8
Dayton Public Schools, 1971-72

	Gr. 6-8		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W		
MacFarlane M.S.	858	5	58	0	916	5	921	99.5
McGuffey	47	159	0	4	47	163	210	22.4
Meadowdale	41	181	0	0	41	181	222	18.5
Patterson Elementary	1	187	0	0	1	187	188	0.5
Residence Park Elementary	393	1	13	0	406	1	407	99.8
Ruskin	1	260	0	8	1	268	269	0.4
Shiloh	0	180	0	0	0	180	180	0.0
Shoup Mill	2	68	0	0	2	68	70	2.9
Valerie	15	108	0	1	15	109	124	12.1
Webster	1	152	0	2	1	154	155	0.6
Westwood	538	1	10	0	548	1	549	99.8
Whittier M.S.	721	4	23	0	744	4	748	99.5
Wogaman	335	1	8	0	343	1	344	99.7
Dr. Wright M.S.	67	877	8	21	65	898	963	6.7
TOTAL BLACK	5351		174		5525			
TOTAL WHITE		6696		77		6773		
TOTAL ENROLLMENT		12047		251		12298	12298	44.9

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Plaintiffs' Exhibit 10

Table 3

Student Enrollment by School and Race
Grades 9-12
Dayton Public Schools, 1971-72

	Gr. 9-12		Sp. Ed.		Ungraded		Total		Total	% Bl.
	B	W	B	W	B	W	B	W		
Belmont H. S.	54	1923	2	60			56	1983	2039	2.7
Dunbar	1284	0	85	0			1369	0	1369	100.0
Fairview	272	1154	0	0			272	1154	1426	19.1
Kiser	45	657	2	27			47	684	731	6.4
Meadowdale H. S.	82	1639	13	44			95	1733	1828	5.2
Patterson Co-op	546	1218	0	0			546	1218	1764	31.0
Roosevelt	1577	1	113	0			1690	1	1691	99.9
Roth	1080	38	69	4			1149	42	1191	96.5
Stivers	147	1014	7	79			154	1093	1247	12.3
Colonel White	757	918	36	16			793	934	1727	45.9
Wilbur Wright	68	1230	6	46			74	1276	1350	5.5
Continuing Education					35	20	35	20	55	63.6
Home Teaching			20	26			20	26	46	43.5
TOTAL BLACK	6912		353		35		6300			
TOTAL WHITE		9842		302		20		10164		
TOTAL ENROLLMENT		16754		655		55		16464	16464	38.3

77-Ex.
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TABLE 4A

STUDENT ENROLLMENT BY RACE: SUMMARY
DAYTON PUBLIC SCHOOLS, 1971-72

	Black	White	Total	%Black
Pre-Kg and Grades K-5	11,719	14,661	26,380	44.4
Grades 6-8	5,525	6,773	12,298	44.9
Grades 9-12	6,300	10,164	16,464	38.3
TOTALS	23,544	31,598	55,142	42.7

TABLE 4B

ATTENDANCE AREAS: SUMMARY
DAYTON PUBLIC SCHOOLS, 1971-72

47 elementary attendance areas: Map I
(primary and elementary units on same site are counted as one attendance area)

5 middle school attendance areas: Overlay I

10 high school attendance areas: Map II
(Patterson Co-op. not an attendance area)

TABLE 4C

TITLE I ELIGIBLE SCHOOLS, 1971-72

NAME OF SCHOOL	Grade Span	Numbers of Children Residing in Attendance Areas: Public School Enrollment	Non Public Enrollment	Not Enrolled Drop Outs	Total	From Low Income Families: Number	From Low Income Families: Percent	1971-72 Estimated Number of Children Who Will Participate in Title I Activities from the Eligible Schools Below: Public	Non Public	Total
A	B	C	D	E	F	G	H	I	J	K
Edison	K-5	579	20	...	599	296	49.4	120	...	120
MacFarlane Mid.	6-8	998	31	...	1,029	489	47.9	...	...	...
Weaver	K-5	959	25	...		457	47.5	120	...	120
Irving	K-5	612	33	...	645	265	44.0	80	...	80
Grace A. Greene	K-5	551	25	...	576	243	42.2	40	...	40
McGuffey	K-8	781	82	...	863	343	39.6	80	...	80
Jackson	K-8	1,294	...	...	1,294	498	38.5	120	...	120
Miami Chapel-Troy	K-5	969	33	...	1,002	333	38.2	120	...	120
Roosevelt H.S.	9-12	1,582	222	575	2,379	714	30.0	...	...	...
Wogaman	K-8	954	30	...	984	288	29.3	40	...	40
Dunbar H.S.	9-12	1,222	73	195	1,490	430	28.9	...	...	...
Highview	K-8	715	30	...	745	211	28.8	40	...	40
Whittier Middle	6-8	807	33	...	840	202	24.1	...	...	...
Hawthorne	K-5	343	84	...	427	99	23.2	40	...	40
Emerson	K-8	872	204	...	1,076	227	21.1	80	...	80
Gardendale	K-8	526	...	...	526	106	20.2	40	...	40
Stivers H.S.	9-12	1,062	250	225	1,537	293	19.1	...	...	...
Huffman	K-8	887	58	...	945	174	18.4	40	...	40
Jefferson	K-5	1,598	104	...	1,702	303	17.8	80	...	80
Longfellow Mid.	6-8	941	305	...	1,246	210	16.9	...	...	...
Kiser H.S.	9-12	634	193	278	1,105	175	15.8	...	...	...
Jane Addams	K-8	579	...	...	579	91	15.7	40	...	40
Ruskin	K-8	813	98	...	911	132	14.5	40	...	40
Colonel White H.S.	9-12	1,676	340	130	2,146	304	14.1	...	...	...
Patterson	K-8	563	53	...	616	87	14.1	40	...	40
Van Cleve	K-5	778	350	...	1,128	157	14.0	40	...	40
Westwood	K-8	1,322	20	...	1,342	188	14.0	40	...	40
Washington	K-8	622	70	...	692	97	14.0	40	...	40
Roth H.S.	9-12	1,143	50	118	1,311	180	13.7	...	...	...
McNary	K-5	417	26	...	443	60	13.5	40	...	40
Carlson	K-8	574	25	...	599	70	11.7	...	...	...
Lincoln	K-8	979	60	...	1,039	80	7.7	...	...	...
Cornell Hgts. Mid.	6-8	788	68	...	856	63	7.4	...	...	...
Residence Park	K-8	1,208	30	...	1,238	87	7.1	...	...	...
Franklin	K-5	666	104	...	770	44	5.7	...	...	...
Orville Wright Mid.	6-8	954	325	...	1,279	70	5.5	...	...	...
Allen	K-8	625	205	...	830	42	5.1	...	...	...
Webster	K-8	502	41	...	543	27	5.0	...	...	...
Wilbur Wright H.S.	9-12	1,213	223	324	1,760	77	4.3	...	...	...
Drexel	K-8	621	...	...	621	21	3.4	...	...	...
Fairport	K-5	775	68	...	843	26	3.1	...	...	...
Cleveland	K-8	1,264	596	...	1,860	26	1.9	...	...	...
Hickoryvale	K-8	471	42	...	513	8	1.6	...	...	...
Fairview H.S.	9-12	1,279	298	194	1,771	26	1.5	...	...	...
Gettysburg	K-8	607	60	...	667	9	1.4	...	...	...
Belmont H.S.	9-12	1,893	162	295	2,350	33	1.4	...	...	...
Belmont Elementary	K-8	596	690	...	1,286	18	1.4	...	...	...
Fort McKinley	K-8	451	101	...	552	7	1.3	...	...	...
Brown	K-8	1,063	233	...	1,296	15	1.2	...	...	...
Lewton	K-8	491	150	...	641	7	1.1	...	...	...
Fairview Elementary	K-8	777	211	...	988	7	0.7	...	...	...
Kemp	K-5	609	208	...	817	6	0.7	...	...	...
Loos	K-8	674	215	...	889	5	0.6	...	...	...

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Numbers of Children Residing in Attendance Areas — 1971-72

NAME OF SCHOOL	Grade Span	Public School Enrollment	Non Public Enrollment	Not Enrolled Drop Outs	Total	From Low-Income Families		Estimated Number of Children Who Will Participate in Title I Activities from the Eligible Schools Below		
						Number	Percent	Public	Non Public	Total
A	B	C	D	E	F	G	H	I	J	K
Grant	K-8	651	217	...	868	4	0.5	...	...	...
Meadowdale H.S.	9-12	1,680	220	158	2,058	10	0.5	...	...	...
Valerie	K-8	423	63	...	486	2	0.4	...	...	...
Shiloh	K-8	632	489	...	1,121	3	0.3	...	...	...
MeadowdaleElementary	K-8	575	252	...	827	2	0.3	...	...	...
Belle Haven	K-8	1,028	253	...	1,281	2	0.2	...	...	...
Eastmont	K-8	659	180	...	839	0	0.0	...	...	...
Horace Mann	K-8	323	207	...	530	0	0.0	...	...	...
Shoup Mill	K-8	284	20	...	304	0	0.0	...	...	...
Patterson Co-op H.S.	9-12	1,710	...	47	1,757	235	13.4*	...	...	...
Gorman	(Spec)	105	...	...	105	14	13.4*	...	...	...
Kennedy	(Spec)	165	...	...	165	22	13.4*	...	...	...
Others in School	(Spec)	126	...	11	137	18	13.4*	...	...	...
TOTAL		54,240	8,858	2,550	65,648	8,788	13.4			

*District-wide Schools

June, 1971

Plaintiffs' Exhibit 10

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Plaintiffs' Exhibit 10

[PHOTO OMITTED]

School organization of grades has, historically, been determined not always by educational research but often by state legislation or by physical facilities. The middle school can be an administrative aid in solving some problem such as racial isolation, but research indicates that it should be, if properly handled, a way to improved education.

The Dayton middle schools should offer eventually such things as differentiated staffing and team teaching, modular scheduling, short exploratory courses, a wide range of electives and activities, increased emphasis upon student government, and greater concern about and communication with the community.

The middle school, beginning with grade 5 or 6 and ending with grade 8 is for that "between-ager" or transitional period covering early adolescence. Grades 6 to 8 cover this 11 to 13 year-old age span and constitute the most common middle school grouping. It cannot follow either an elementary or secondary model in content or process; it must focus upon the problems of puberty and understand the needs of the learners at this age. Research indicates that youngsters are reaching physical and social maturity earlier.

The middle school should not be established merely as an aid to desegregation. While it might permit children to get out of segregated neighborhood schools at an earlier age, high quality education will not result without careful preplanning of the instructional program. This "planning" can be simultaneous with the preliminary work which is necessary to develop an effective, integrated school system.

CLOSING SCHOOLS

The Dayton system does have some extra space available in some of its schools, and the student population projection indicates a declining number of students over the next five years. Some of the older, less-suitable buildings could therefore be abandoned.

Recommendation 2. — Hawthorne Elementary, Washington Elementary, Ft. McKinley Elementary, and Roosevelt High School should be closed as regular classroom facilities by September, 1972.

Hawthorne was originally constructed in 1887 with an addition in 1909. It is in a poor location hemmed in by an interstate highway and has an inadequate site of 0.8 acres. Washington was originally constructed in 1898 with additions in 1926 and 1969. It is on an inadequate site of 2.3 acres. Ft. McKinley is a newer building (1924) but is rated as inadequate for an instructional facility. Its site is only 2.7 acres. Roosevelt High is generally considered to be the least adequate Dayton high school facility with a poor site of 5.2 acres.

ELEMENTARY ASSIGNMENTS, 1972-73

Elementary attendance zones for 1971-72 are illustrated on Map 1 and middle school zones on Overlay 1. If two elementary schools discontinued (leaving Ft. McKinley as operational for the moment) and 10 elementary schools are changed to middle schools, a total of 35 elementary attendance zones would remain (Overlay 2). Estimated enrollment figures are given for these (Table 5) and for the 15 middle school zones that would be hypothetically created (Table 6 and Overlay 3). Without considering prekindergarten children as part of the basic K-5 pattern, it is possible to desegregate these elementary schools by leaving four of them as they are and by joining the remaining schools in 11 clusters (Table 7).

Recommendation 3. — The following assignment of K-5 pupils to elementary attendance zones be made September, 1972.

Fairport:	same as 1971-72
McGuffey:	same as 1971-72

Drexel:	same as 1971-72 plus Jane Addams zone
Gardendale:	same as 1971-72 plus 2/3 of Gettysburg zone
Cluster A:	Irving (Kg-1)
	Emerson (Gr. 2-5)
	Patterson (Gr. 2-5)
Cluster B:	Eastmont (Kg-2)
	Lewton (Kg-2)
	MC-LT (Gr. 3-5)
Cluster C:	Cleveland (Kg-2)
	Highview (Gr. 3-5)
	Mann (Kg-2)
Cluster D:	Carlson (Kg-1)
	Huffman (Gr. 2-5)
	Ruskin (Gr. 2-5)
Cluster E:	Van Cleve (Kg-1)
	Edison (Gr. 2-5)
Cluster F:	Jefferson (Kg-2)
	Fairview (Gr. 3-5)
	Valerie (Gr. 3-5)
Cluster G:	Belle Haven (Kg-2)
	Jackson (Gr. 3-5)
	Ft. McKinley (out)
Cluster H:	Allen (Kg-2)
	Kemp (Kg-2)
	Res. Pk. (Gr. 3-5)
Cluster I:	Hickorydale (Kg-2)
	Loos (Kg-2)
	Weaver (Gr. 3-5)
Cluster J:	Franklin (Kg-2)
	Greene (Gr. 3-5)

Plaintiffs' Exhibit 10

Cluster K: McNary (Kg-2)
Shoup Mill (Gr. 3-5)
Shiloh (Gr. 3-5)

The redistribution would leave all elementary schools within a range of 27.6 per cent black to 54.5 per cent black with most of the schools hovering closely to the 44.9 overall average. An effort was also made to cluster schools by economic levels. Table 7A illustrates the percentage of Title 1 (ESEA) families in each assigned cluster.

It should be noted that a total of 34 elementary (K-5) attendance areas would be left with Ft. McKinley not used. The clustered zones are based on the revised zones and not the current 1971-72 attendance areas.

Recommendation 4. – The assignment of pupils to carry out Recommendation 3 should be made in each of the clusters by the principals affected in cooperation with the central office staff. Pupils moved should in all cases be the farthest located from their present school assignment where a choice has to be made.

MIDDLE SCHOOL ASSIGNMENTS, 1972-73

Estimated enrollment for the 15 revised – but hypothetical – middle school zones is shown in Table 6. These are all contiguous zones made up merely as a paper operation to establish an intermediate base for final recommendations for the middle schools. Estimated enrollment figures for the recommended desegregation plan for middle schools are given in Table 8 and zones are shown on Overlay 5. The school zones listed are 1971-72 assignment areas. Thus, Jane Addams Middle School would be assigned pupils from the current Jane Addams Elementary zone, the Drexel zone, and the Shoup Mill zone.

Plaintiffs' Exhibit 10

TABLE 5

ESTIMATED ENROLLMENT BY SCHOOL AND RACE
REVISED ELEMENTARY SCHOOL ZONES
PRE-KINDERGARTEN AND GRADES K-5
DAYTON PUBLIC SCHOOLS

	Pre-Kdg.		Kdg.		Gr. 1-5		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W	B	W	B	W		
Allen	0	0	0	88	4	513	0	2	4	603	607	0.1
Belle Haven	0	0	7	101	39	473	0	0	46	574	620	7.4
Carlson	21	0	84	1	582	2	7	0	704	3	707	99.6
Cleveland	0	0	0	176	1	821	0	0	1	997	998	0.1
Drexel	33	5	42	82	237	402	11	9	323	498	821	39.3
Eastmont	0	0	0	122	2	552	0	0	2	674	676	0.3
Edison	112	13	118	42	407	177	15	0	742	232	974	76.2
Emerson	6	57	8	68	22	411	0	15	36	551	587	6.1
Fairport	0	0	58	102	274	398	2	7	334	507	841	39.7
Fairview	0	0	6	130	20	673	0	4	26	807	833	3.1
Ft. McKinley	0	0	0	50	5	247	0	0	5	297	302	1.7
Franklin	8	8	8	123	30	760	0	12	46	903	949	4.8
Gardendale	32	5	48	55	241	291	0	0	321	351	672	47.8
Greene	47	1	42	1	463	18	7	0	559	20	579	96.5
Hickorydale	0	0	11	58	43	263	0	8	54	329	383	14.1
Highview	62	0	117	0	599	10	22	0	800	10	810	98.8
Huffman	0	40	0	101	1	642	0	11	1	794	795	0.1
Irving	78	1	102	0	576	3	20	0	776	4	780	99.5
Jackson	138	0	136	0	688	7	10	0	972	7	979	99.3
Jefferson	0	0	190	35	1205	126	23	0	1418	161	1579	89.8
Kemp	8	8	14	112	64	669	1	9	87	798	885	9.8
Lewton	0	0	0	84	2	371	0	7	2	462	464	0.4
Loos	0	0	4	129	28	608	1	4	33	741	774	4.3

TABLE 5

ESTIMATED ENROLLMENT BY SCHOOL AND RACE
REVISED ELEMENTARY SCHOOL ZONES
PRE-KINDERGARTEN AND GRADES K-5
DAYTON PUBLIC SCHOOLS

	Pre-Kdg.		Kdg.		Gr. 1-5		Sp. Ed.		Total		Total	% Bl.
	B	W	B	W	B	W	B	W	B	W		
Horace Mann	0	0	0	83	0	345	0	0	0	428	428	0.0
McGuffey	39	34	35	59	151	315	0	7	225	415	640	35.2
McNary	53	0	98	0	462	1	12	0	623	1	624	99.9
MC – LT	127	0	143	0	801	2	0	0	1071	2	1073	99.8
Patterson Elementary	0	39	1	106	2	599	1	4	4	748	752	0.5
Residence Park	41	0	182	0	1072	6	21	0	1316	6	1322	99.5
Ruskin	0	37	0	134	1	694	1	19	2	884	886	0.2
Shiloh	0	0	0	61	5	304	0	0	5	365	370	1.4
Shoup Mill	0	0	0	20	1	116	0	0	1	136	137	0.7
Valerie	0	0	6	60	27	422	0	3	33	485	518	6.4
Van Cleve	11	23	15	113	87	511	0	0	113	647	760	14.9
Weaver	120	0	114	0	734	3	21	0	993	3	1001	99.7
Gorman							12	89	12	89	101	11.9
Kennedy							24	129	24	129	153	15.7
TOTAL BLACK	945		1597		8366		211		11719			
TOTAL WHITE		271		2206		11756		339		14661		
TOTAL ENROLLMENT		1216		3803		20721		550		26380	26380	44.4

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TABLE 6
ESTIMATED ENROLLMENT BY SCHOOL AND RACE
REVISED MIDDLE SCHOOL ZONES, GRADES 6-8
BASED ON REVISED ELEMENTARY ATTENDANCE ZONES
DAYTON PUBLIC SCHOOLS

	Gr. 6-8 & Sp. Ed. B	W	Total	%Bl.
Jane Addams M.S.				
Drexel	188	170	358	
	188	170	358	52.5
Belmont M.S.				
Mann	2	215	217	
Cleveland	3	426	429	
	5	641	646	0.8
Brown, M.S.				
Fairview	34	408	442	
Loos	11	379	390	
Shoup Mill	2	68	70	
	47	855	902	5.2
Cornell Hgts. M.S.				
Fairport	199	208	407	
Jefferson	667	24	691	
	866	232	1098	78.9
Gettysburg M.S.				
Ft. McKinley	2	147	149	
Gardendale	145	185	330	
Hickorydale	34	164	198	
	181	496	677	26.7
Grant M.S.				
Eastmont	1	363	364	
Lewton	1	222	223	
	2	585	587	0.3
Lincoln M.S.				
Huffman	0	350	350	
Ruskin	4	427	431	
	4	777	781	0.5

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TABLE 6 (Cont'd)

	Gr. 6-8 & Sp. Ed. B	W.	Total	%Bl.
Longfellow M.S.				
Greene	235	4	239	
Van Cleve	56	238	294	
	291	242	533	54.6
MacFarlane M.S.				
Edison	349	74	423	
Weaver	394	2	396	
	743	76	819	90.7
Meadowdale M.S.				
Belle Haven	56	318	374	
Shiloh	0	180	180	
Valerie	56	290	346	
	112	788	900	12.4
Orville Wright M.S.				
Franklin	47	416	463	
Kemp	18	482	500	
	65	898	963	6.7
Webster M.S.				
Allen	2	267	269	
McGuffey	47	163	210	
	49	430	479	10.2
Westwood M.S.				
Jackson	421	3	424	
McNary	229	1	230	
Res. Park	817	2	819	
	1467	6	1473	99.6
Whittier M.S.				
Emerson	10	219	229	
Irving	311	2	313	
Patterson	3	347	350	
	324	568	892	36.3
Wogaman M.S.				
Highview	300	6	306	
Carlson	358	1	359	
MC - LT	433	2	435	
	1181	9	1190	99.2
TOTALS	5525	6773	12298	44.9

TABLE 7

ESTIMATED ENROLLMENT BY SCHOOL AND RACE
GRADES (K-5) & SP. ED.
RECOMMENDED ELEMENTARY ZONES, 1972-73
DAYTON PUBLIC SCHOOLS

					Sp. Ed.		Total				
	B	W	B	W	B	W	B	W	Total	Cap.	% Bl.
(Maintain 1971-72 Attendance Zones)											
	Kg.		Gr. 1-5								
Fairport	58	102	274	398	2	7	334	507	841	981	39.7
McGuffey	35	59	151	315	0	7	186	381	567	981	32.8
(Maintain Revised Attendance Zones)											
	Kg.		Gr. 1-5								
Drexel	42	82	237	402	11	9	290	493	783	919	37.0
Gardendale	48	55	241	291	0	0	289	346	635	702	45.5
(Cluster A)											
	Kg – 1		Gr. 2-5								
Emerson	0	0	254	326	21	19	275	345	620	1399	44.4
Irving	217	380	0	0	0	0	217	380	597	1059	36.3
Patterson	0	0	240	481	0	0	240	481	721	879	33.3

Kg – 1 in Irving remain
Kg – 1 in Emerson and Patterson to Irving
Gr. 2 – 5 in Emerson remain
Gr. 2 – 5 in Patterson remain
Gr. 2 – 5 in Irving: 245 to Emerson; 236 to Patterson

(Cluster B)											
	Kg – 2		Gr. 3-5								
Eastmont	224	334	0	0	0	0	224	334	558	1130	40.1
Lawton	225	247	0	0	0	7	225	254	479	684	47.0
MC – LT	0	0	499	550	0	0	499	550	1049	1747	47.6

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TABLE 7 (Cont'd)

	B	W	B	W	Sp. Ed. B	Sp. Ed. W	Total B	Total W	Total	Cap.	% Bl.
	Kg – 2 in Eastmont and Lewton remain						Gr. 3 – 5 in MC – LT remain				
	Kg – 2 in MC – LT: 226 to Eastmont; 224 to Lewton						Gr. 3 – 5 in Eastmont and Lewton to MC – LT				
(Cluster C)											
	Kg – 2		Gr. 3-5								
Cleveland	242	532	0	0	0	0	242	532	774	1412	31.3
Highview	0	0	357	675	22	0	379	675	1054	1191	35.0
Mann	113	228	0	0	0	0	118	228	346	646	34.1
	Kg – 2 remain in Cleveland and Mann						Gr. 3 – 5 remain in Highview				
	Kg – 2 from Highview: 245 to Cleveland; 119 to Mann						Gr. 3 – 5 from Cleveland and Mann to Highview				
(Cluster D)											
	Kg – 1		Gr. 2-5								
Carlson	208	453	0	0	0	0	208	453	661	927	31.5
Huffman	0	0	238	618	0	0	238	618	856	1225	27.6
Ruskin	0	0	234	505	8	28	242	533	775	1170	31.2
	Kg – 1 remain in Carlson						Gr. 2 – 5 remain in Huffman and Ruskin				
	Kg – 1 from Huffman and Ruskin to Carlson						Gr. 2 – 5 from Carlson: 238 to Ruskin; 233 to Huffman				
(Cluster E)											
	Kg – 1		Gr. 2-5								
Van Cleve	231	338	0	0	15	0	246	338	582	713	42.3
Edison	0	0	486	507	0	0	486	507	993	1130	48.9
	Kg – 1 in Van Cleve remain						Gr. 2 – 5 in Edison remain				
	Kg – 1 from Edison to Van Cleve						Gr. 2 – 5 from Van Cleve: 345 to Edison				
(Cluster F)											
	Kg – 2		Gr. 3-5								
Jefferson	689	714	0	0	23	7	712	721	1433	1447	49.7

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TABLE 7 (Cont'd)

					Sp. Ed.		Total				
	B	W	B	W	B	W	B	W	Total	Cap.	% Bl.
Fairview	0	0	416	441	0	0	416	441	857	858	48.5
Valerie	0	0	349	291	0	0	349	291	640	765	54.5

Kg – 2 In Jefferson remain
Kg – 2 from Fairview and Valerie to Jefferson

Gr. 3 – 5 in Valerie and Fairview remain
Gr. 3 – 5 from Jefferson: 446 to Fairview; 366 to Valerie

(Cluster G)

	Kg – 2		Gr. 3-5								
Belle Haven	423	448	0	0	0	0	423	448	871	1263	48.6
Jackson	0	0	462	430	10	0	462	430	892	1747	51.8
Ft. McKinley	0	0	0	0	0	0	0	0	0	542	

Kg – 2 in Belle Haven remain
Kg – 2 from Ft. McKinley and Jackson to Belle Haven

Gr. 3 – 5 in Jackson remain
Gr. 3 – 5 from Ft. McKinley and Belle Haven to Jackson
Make other use of Ft. McKinley School.

(Cluster H)

	Kg – 2		Gr. 3-5								
Allen	286	305	0	0	0	0	286	305	591	871	48.4
Kemp	327	412	0	0	0	0	327	412	739	838	44.2
Res. Pk.	0	0	723	671	22	11	745	682	1427	1589	52.2

Kg – 2 In Allen and Kemp remain
Kg – 2 from Residence Park: 284 to Allen; 283 to Kemp

Gr. 3 – 5 in Residence Park remain
Gr. 3 – 5 from Allen and Kemp to Residence Park

(Cluster I)

	Kg – 2		Gr. 3-5								
Hickorydale	150	165	0	0	0	0	150	165	315	716	47.6
Loos	306	405	0	0	0	0	306	405	711	881	43.0
Weaver	0	0	478	491	22	12	500	503	1003	1241	49.9

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TABLE 7 (Cont'd)

	B	W	B	W	Sp. Ed. B	Sp. Ed. W	Total B	Total W	Total	Cap.	% Bl.
Kg – 2 in Hickorydale and Loos remain							Gr. 3 – 5 in Weaver remain				
Kg – 2 from Weaver: 290 to Loos; 120 to Hickorydale							Gr. 3 – 5 from Hickorydale and Loos to Weaver				
(Cluster J)											
	Kg – 2		Gr. 3-5								
Franklin	227	451	0	0	7	12	234	463	697	1118	33.6
Greene	0	0	316	451	0	0	316	451	767	776	41.2
Kg – 2 in Franklin remain							Gr. 3 – 5 in Greene remain				
Kg – 2 from Greene to Franklin							Gr. 3 – 5 from Franklin to Greene				
(Cluster K)											
	Kg – 2		Gr. 3-5								
McNary	271	254	0	0	12	0	283	254	537	669	52.7
Shoup Mill	0	0	80	65	0	0	80	65	145	639	55.2
Shiloh	0	0	213	183	0	0	213	183	396	850	53.8
Kg – 2 in McNary remain							Gr. 3 – 5 in Shoup Mill and Shiloh remain				
Kg – 2 from Shoup Mill and Shiloh to McNary							Gr. 3 – 5 from McNary: 79 to Shoup Mill and 210 to Shiloh				

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Plaintiffs' Exhibit 10

TABLE 7A

PERCENTAGE OF TITLE I (ESEA) FAMILIES
BY RECOMMENDED ELEMENTARY ZONE CLUSTERS
DAYTON PUBLIC SCHOOLS

		Percentage of children in low income families
Cluster A:	Emerson	21
	Irving	44
	Patterson	14
Cluster B:	Eastmont	0
	Lawton	1
	MC-LT	38
Cluster C:	Cleveland	2
	Highview	29
	Mann	0
Cluster D:	Carlson	12
	Huffman	18
	Ruskin	15
Cluster E:	Van Cleve	14
	Edison	49
Cluster F:	Jefferson	18
	Fairview	1
	Valerie	0
Cluster G:	Belle Haven	0
	Jackson	39
	Ft. McKinley	1
Cluster H:	Allen	5
	Kemp	1
	Res. Pk.	7
Cluster I:	Hickorydale	2
	Loos	1
	Weaver	48
Cluster J:	Franklin	6
	Greene	42
Cluster K:	McMary	14
	Shoup Mill	0
	Shiloh	0

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Recommendation 5. — The following assignment of Grade 6-8 pupils to 15 middle school attendance zones be made September 1, 1972:

Jane Addams Middle School: Jane Addams Elementary, Drexel and Shoup Mill

Belmont Middle School: Belmont Elementary, Eastmont, and Edison

Brown Middle School: Brown Elementary, Jefferson (3/4), and Loos

Cornell Hgts. Middle School: Fairport, Fort McKinley, and Jefferson (1/4)

Gettysburg Middle School: Gettysburg Elementary, Gardendale, Hickorydale, and Res. Pk. (1/4)

Grant Middle School: Grant Elementary, Highview, and Lewton

Lincoln Middle School: Lincoln Elementary, MC-LT, and Ruskin

Longfellow Middle School: Greene, Hawthorne, Van Cleve, and Allen

MacFarlane Middle School: Fairview, Bell Haven, and Weaver

Meadowdale Middle School: Jackson, Meadowdale Elementary, Shiloh, and Valerie

Orville Wright Middle School: Carlson, Kemp, and McNary

Webster Middle School: Huffman, Res. Park (3/4), and Webster Elementary

Westwood Middle School: Franklin, Washington, Westwood Elementary, and McGuffey

Whittier Middle School: Emerson, Irving, and Patterson

Wogaman Middle School: Cleveland, Wogaman, and H. Mann

The desegregation plan for middle schools effectively removes racial identifiability of schools as they would then range from 38.0 per cent black to 50.5 per cent black and would approach racial balance closely. A good mix of economic levels is also indicated as shown in the Table 8 assignments.

HIGH SCHOOL ASSIGNMENTS, 1972-73

Current high school assignment zones are shown on Map 2. Using the recommended middle school zones as a base (Table 8, Overlay 5), it would not be difficult to feed these zones directly into the nine high schools (Table 9, Overlay 6 – phasing out Roosevelt and leaving Patterson Co-op as a city-wide school). Since pupil locater maps are not available, estimated enrollment figures for the 1972-73 recommended high school attendance areas had to be extrapolated from estimated enrollments by race for the middle schools. Index figures of 103.1 for blacks and 131.4 for whites were used.

Recommendation 6. – The following assignment of grade 9-12 pupils to high school attendance zones be made September, 1972: (Middle school zones are the recommended 1972-73 zones and elementary zones are 1971-72.)

Belmont High:	Belmont M.S. and Grant M.S. plus Mann El.
Dunbar:	Lincoln M.S. and Wogaman M.S. minus Mann El.
Fairview:	McFarlane M.S. plus Webster El. and Res. Park El. (1/4)
Kiser:	Longfellow M.S.
Meadowdale:	Cornell Hgts. M.S. and Meadowdale M.S. plus Shoup Mill El.
Roth:	J. Addams M.S. and Gettysburg M.S.
Stivers:	Webster M.S. and Whittier M.S. minus Webster El. and Res. Pk. El. (1/4)

Col. White:	Brown M.S. plus McNary El. and McGuffey El.
Wright High:	Or. Wright M.S. and Westwood M.S. minus McNary El. and McGuffey El.

The redistribution of high school students would leave the 9 schools within a range of 44.3 per cent black to 32.3 per cent black.

It should be remembered that the above figures for all 3 levels of school organization are rough estimates based upon the best data immediately available. It is anticipated that many revisions and refinements in such a plan for desegregation of pupils would be made after careful review by the local staff.

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Plaintiffs' Exhibit 10

TABLE 5

ESTIMATED ENROLLMENT BY SCHOOL AND RACE
RECOMMENDED MIDDLE SCHOOL ZONES, GRADES 6-8, 1972-73
BASED ON CURRENT ELEMENTARY ATTENDANCE ZONES
DAYTON PUBLIC SCHOOLS

	Gr. 6-8 & Sp. Ed. B	Gr. 6-8 & Sp. Ed. W	Total T.	Cap.	%Bl.	%Title I
Jane Addams M.S.						
J. Addams Elementary	174	24	198			16
Drexel	14	146	160			3
Shoup Mill	2	68	70			0
	190	238	428	850	44.4	
Belmont M.S.						
Belmont Elementary	0	183	183			1
Eastmont	0	231	231			0
Erilson	303	1	304			49
	303	415	718	819	42.2	
Brown M.S.						
Brown Elementary	9	345	354			1
Jefferson (3/4)	500	18	518			18
Loos	6	207	213			1
	515	570	1085	1208	47.5	
Cornell Hgts. M.S.						
Fairport	199	208	407			3
Ft. McKinley	2	147	149			1
Jefferson (1/4)	167	6	173			18
	368	361	729	900	50.5	
Gettysburg M.S.						
Gettysburg Elementary	42	190	232			1
Garfieldale	114	43	157			20
Hickorydale	23	116	139			2
Res. Park (1/4)	102	0	102			7
	281	349	630	831	44.6	
Grant M.S.						
Grant Elementary	1	198	199			1
Highview	218	5	223			29
Lewton	1	156	157			1
	220	359	579	980	38.0	
Lincoln M.S.						
Lincoln Elementary	5	319	324			8
MC-LT	433	2	435			38
Ruskin	1	288	289			15
	439	589	1028	1175	42.7	

99-Ex.

Plaintiffs' Exhibit 10

TABLE 5 (Cont'd)

	Gr. 6-8 & Sp. Ed. B	Gr. 6-8 & Sp. Ed. W	Total T.	Cap.	%Bl.	%Title I
Longfellow M.S.						
Greene	235	4	239			42
Hawthorne	46	73	119			23
Van Cleve	56	238	294			14
Allen	1	100	101			5
	338	505	843	1207	40.1	
MacFarlane M.S.						
Fairview	30	235	265			2
Belle Haven	56	318	374			0
Weaver	394	2	396			48
	480	555	1035	1202	46.4	
Meadowdale M.S.						
Jackson	421	3	424			39
Meadowdale Elementary	41	181	222			0
Shiloh	0	180	180			0
Valerie	15	109	124			0
	477	473	950	980	50.2	
Orville Wright M.S.						
Carlson	187	1	188			12
Kemp	0	378	378			1
McNary	184	2	186			14
	371	381	752	971	49.3	
Webster M.S.						
Huffman	0	273	273			18
Res. Park (3/4)	304	1	305			7
Webster Elementary	1	154	155			5
	305	428	733	768	41.6	
Westwood M.S.						
Franklin	29	312	341			6
Washington	38	208	244			14
Westwood Elementary	456	0	456			14
McGuffey	47	163	210			40
	568	683	1251	1532	45.4	
Whittier M.S.						
Emerson	10	210	220			21
Irving	311	2	313			44
Patterson	1	187	188			14
	322	408	730	1005	44.1	
Wogaman M.S.						
Cleveland	3	305	308			29
Wogaman	343	1	344			2
H.Mann	2	93	95			0
	348	490	807	1157	43.1	
TOTALS	5525	6773	12200		44.9	

TABLE 9

ESTIMATED ENROLLMENT BY SCHOOL AND RACE
RECOMMENDED HIGH SCHOOL ZONES, GRADES 9-12, 1972-73
BASED ON CURRENT ELEMENTARY ATTENDANCE ZONES
DAYTON PUBLIC SCHOOLS

	Gr. 9-12 & Sp. Ed. B.	W.	Total	Cap.	%Bl.
Belmont					
Belmont M.S. (Belmont - Eastmont - Edison)	312	545	857		
Grant M.S. (Grant - Highview - Lawton)	227	472	699		
	539	1017	1556		
(+) Mann El	2	122	124		
	541	1139	1680	2618	32.2
Dunbar					
Lincoln M.S. (Lincoln - MC - LT - Ruskin)	453	774	1227		
Wogaman M.S. (Cleveland - Mann Wogaman)	360	603	963		
	813	1377	2190		
	2	122	124		
	811	1255	2066	2453	39.2
Fairview					
MacFarlane M.S. (Fairview - Belle Haven - Weaver)	495	729	1224		
(+) Webster El	1	202	203		
(+) Res Park 1/4	104	0	104		
	600	931	1531	1845	39.2
Kiser					
Longfellow M.S. (Allen - Greene - Hawthorne - Van Cleve)	348	664	1012*	1245	34.4

TABLE 9 (Cont'd)

	Gr. 9-12 & Sp. Ed. B.	W.	Total	Cap.	%Bl.
Meadowdale					
Carrell Hts. M.S. (Fairport - Ft. McKinley - Jefferson 1/4)	379	474	853		
Meadowdale M.S. (Jackson - Meadowdale - Shiloh - Valerie)	493	622	1115		
	872	1096	1968		
(+) Shoup Mill El	2	89	91		
	874	1185	2059	2950	44.3
Roth					
J. Addams M.S. (J. Addams - Drexel - Shoup Mill)	106	313	509		
Gettysburg M.S. (Gardendale - Gettysburg Hickorydale - Res. Park 1/4)	290	459	749		
	486	772	1258		
(+) Shoup Mill El	2	89	91		
	484	683	1167	1856	41.5
Stivers					
Webster M.S. (Huffman - Res Park 3/4 - Webster)	314	562	876		
Whittier M.S. (Emerson - Irving - Patterson)	332	536	868		
	646	1098	1744		
(-) Webster El	1	202	203		
(-) Res. Park 1/4	104	0	104		
	541	896	1437	1530	37.6
Col. White					
Brown M.S. (Brown - Jefferson 3/4 - Loos)	531	749	1280		
(+) McNary El	190	3	193		
(+) McGuffey El	48	214	262		
	760	966	1735	2288	44.3

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TABLE 9 (Cont'd)

	Gr. 9-12 & Sp. Ed. B.	W.	Total	Cap.	%BI.
W. Wright					
Or. Wright M.S. (Carlson - Kemp - McNary)	383	501	884		
Westwood M.S. (Franklin - McGuffey - Washington - Westwood)	586	897	1483		
(-) McNary El	100	3	193		
(-) McGuffey El	48	214	262		
	731	1181	1912	2075	38.2
Sub-Totals	5889	8900	14509		39.0
(+) Patterson Co-op	548	1218	1764	2337	31.0
(+) Ungraded	35	20	55		
(+) Home Teaching	20	26	46		
TOTAL H.S.	6300	10164	16464		38.3

Plaintiffs' Exhibit 10

TRANSPORTATION OF PUPILS

It is obvious that pupil transportation will be increased if genuine desegregation occurs. A rough estimate of increased transportation needs is included as an attachment to the report along with an explanation of how the cost of such transportation might be met. Under new Ohio legislation for local district reimbursement for pupil transportation expenses it would appear that transportation costs for the desegregation plan can be met wholly or in large part out of state funds with no increase in local budget.

[PHOTO OMITTED]

GENERAL RECOMMENDATIONS FOR DESEGREGATION

In Part I of this report, the current status of the desegregation effort in the Dayton City Schools was reviewed. That analysis was based upon current information provided by the Superintendent.

Part II gave specific recommendations for ending the racial imbalance in enrollments for the various schools at different grade levels.

This section gives some general comments and recommendations which may assist school and community leaders in their affirmative action toward an integrated school system.

An annual review of faculty assignments by school and teaching field should be made to determine to what extent race should be a consideration in recruitment, employment, and assignment activities. The need for racial balance should be a reality to be considered not only in school policy but in negotiating master contracts.

Inservice education for integration needs to be relevant, required, rewarded, and continuous. A planning committee should involve teachers, administrators, students, community advisers, and representatives of area institutions of higher edu-

cation. The greater use of teacher aides providing biracial teams should be made where feasible.

While the ratio of blacks and whites is fairly reasonable for administrative staff in Dayton, the following general recommendations are made.

1. Until full integration is achieved district-wide, the tendency to put black administrators in schools having a high proportion of black pupils or which are located in black communities should be avoided. Biracial administrative teams should be assigned where there is more than one building administrator.
2. Black administrators should be given an equal opportunity to work in line as well as staff positions in the administrative structure.

When the desegregation plan becomes reality the transfer policy for pupils should be rewritten to discontinue all optional zones or free enrollment. Transfers only for health or pertinent educational or administrative reasons should be allowed. Policing of pupil addresses will need to be made.

In order to facilitate up-to-date pupil assignment operations it is recommended that for the immediate situation pupil locater information and a set of good zone maps be developed. After this it is recommended that a computer-based pupil data system be effected. The Miami Desegregation Center is currently publishing a computerized operational plan for desegregation of pupils which can be used very easily in a system such as Dayton once the pupil data base is established.

The following general recommendations are given for community and school representatives.

1. School representatives should meet regularly with their counterparts from all Dayton Standard Metropolitan Service Area (SMSA) agencies and institutions to communicate about respective programs and to achieve maximum coordination of and impact from various

service efforts. Such problems as housing patterns, metropolitan government, and cooperative educational efforts should be explored.

2. The Dayton Advisory Council on Education (DACE) should be continued with a provision for annual review by DACE and the District as to the representativeness and activities of the Council. Established to advise the Superintendent on such matters as desgregation, its need will increase as desegregation becomes integration.
3. While mass media are valuable, they do not replace small discussion groups in the total public information program. These groups should be continued at the local school level and involve principals, teachers, and other employees who previously have become cognizant of the goals of an integrated school system through the inservice programs discussed above.

A continued and improved analysis should be made of socioeconomic patterns of students so that this factor can become a more effective input to the student assignment process.

If not already part of the program, curriculum units concerning human relations, minority group cultures, urban government and ecology, and family finance should be included at each instructional level.

The entire grading, reporting, counseling, and testing programs should be reviewed in light of desegregated schools compared to traditional schools. Grouping practices for instruction are particularly vulnerable.

Many parents and other citizens enjoy their schools as community centers, too. They may see desegregation as a threat to this activity. The Board should insure, by policy statement, that any desegregation plan will protect the community use of school facilities in a secure fashion and, if necessary, provide transportation so the community center

concept will be implemented. Desegregation in extracurricular activities is an essential component of any unitary plan.

The Board should in January, 1972, place bids for additional buses for September delivery so that economies in group bidding can be effected. Simultaneously, local transit companies might be invited to submit a comparative cost estimate.

Security of buildings and children is a concern especially where desegregation has been suddenly imposed upon a school system. At the secondary level it is strongly recommended that student biracial advisory committees become a part of the school's operation. Urban secondary school principals can make effective use of such committees in affirmative action to prevent student unrest.

Districts which are segregated typically are operating substandard programs in some schools, and desegregation usually forces an upgrading of the instructional program. It is assumed that Dayton is no different than other major cities and that additional financial aid will be necessary. All federal and state sources should be investigated including the new Emergency School Assistance Program should it become law; Title IV, P.L. 88-352 monies, and funding under the new Educational Renewal Centers concept (USOE).

The recommended plan attempts to desegregate schools in such a manner that they will not be racially identifiable: not black schools, nor white schools – just schools. If such a plan is to work effectively the entire metropolitan Dayton area should be involved and not just the city. It is recommended that the Board continue its effort to involve the metro community. Particular attention should be given to the current lawsuits in Indianapolis, Richmond (Virginia), and Detroit.

The prekindergarten pupils were not included in the desegregation plan. It is recommended that they be sent to their nearest elementary school location and where capacity does not permit their being housed, transportation be provided to the next building with space available.

[PHOTO OMITTED]

APPENDIX I

Estimation of transportation costs, reimbursements and financing, assuming 40% of current enrollments being transported:

Students

53,400 public students x 40%	21,360
Plus non-public students now being transported	1,000
Total Students	22,360

Trips

50 high-school pupils per bus – 17,000 x 40% =	6,800 or 136 trips	
70 elementary pupils per bus – 36,400 x 40% =	14,560 or 208	"
60 non-public pupils per bus	1,000 or 17	"
Total Trips	361	

Capital Outlay – Vehicles

2.75 trips per bus = 131 buses + 13 spares = 144 total vehicles
Less vehicles already Board-owned – 14

Net Additional Buses Needed 130

Estimated State bid price $9,000 x 130 vehicles = $1,170,000
Estimated State reimbursement @ 27% = 315,900

Net Local Purchase Cost $ 854,100

Capital Outlay – Facilities

Land – 5 acres with proper access	$ 100,000
New building with 8 vehicle bays	300,000
Asphalt paving, fencing, lighting	35,000
Equipment	15,000
Estimated Building Cost	$ 450,000

Estimated State Reimbursement for Operations

Board-owned vehicles – $14 per student + $22 per mile
22,360 x $14 = $313,040 + 60,000 miles x $22 = $176,000

Total $489,040

A Contract vehicles – $16 per student + $20 per mile
22,360 x $16 = $357,760 + 80,000 miles x $20 = $232,000

Total $589,760

Plaintiffs' Exhibit 10

Estimated Operating Cost

Board-owned buses – 22,360 pupils x $50 each = $ 1,118,000
A Contract buses – 22,360 pupils x $67 each = 1,498,120

Estimated Operating Cost Less State Reimbursement

	Board-owned	A Contract
Estimated operating cost	$1,118,000	$1,498,120
Estimated State reimbursement	489,040	589,760
Net Operating Cost	$ 628,960	$ 908,360

Savings with Board-owned vehicles = $279,400

If savings were applied to capital investment of $1,304,100 (vehicles and building), payback would be accomplished in 4.6. years.

FINANCING THE LOCAL COST

	1972	Annual
Needs		
Net local operating cost	$ 251,584	$ 628,960
Local capital outlay	1,304,100	-0-
Total Needed	$1,555,684	$ 628,960
Sources		
Maintain 1970 level of local funding	$ 433,000	
From new State funds*	1,122,684	
Total Available	$1,555,684	

*Principally from the new Municipal Overburden fund. The district will receive $20 per pupil, or approximately $1,060,000 a year, from that part of the newly enacted State program.

☆U.S. GOVERNMENT PRINTING OFFICE: 1972-715-870/158-72(2-11)

PLAINTIFF'S EXHIBIT 11A

[LETTERHEAD OF DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, WASHINGTON D.C. 20201]

OFFICE OF THE SECRETARY

Dear Dr. Carle:

Representatives of the Office for Civil Rights conducted a Title VI Compliance Review of the Dayton Public Schools during the period November 12-22, 1968. We have completed our analysis of the information gathered during the review and have made the determination that your district is not complying with Title VI of the Civil Rights Act of 1964.

An analysis of the data obtained during the review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff. Thus, all Negro principals are assigned to predominantly Negro schools, as are 11 of the 14 Negro assistant principals; 156 out of 181 Negro high school teachers are assigned to schools where Negroes constitute 92 percent of the total enrollment. Over 85 percent of the Negro elementary teachers instruct in schools having a preponderance of Negro pupils, and only 14 percent of teachers of the white race are in schools where Negroes are in the majority. The assignment of counsellors and coaches follows a similar pattern.

The existence in your district of a substantial duality in terms of race or color with respect to distribution of pupils in the various schools, is a matter of concern to us. The fact appears to be that of a total of 5,627 Negro high school pupils, approximately 85 percent are concentrated in 3 high schools in which the percentage of Negro attendance ranges from 92.3 percent to 100 percent. Similarly, 15,479 (approximately 85 percent) Negro elementary pupils attend 20 out of the 53

elementary schools in your district. It is noteworthy that in 17 of these 20 schools, Negroes constitutes 90-100 percent of the total enrollment.

Our review also indicates that students at Roosevelt High School are not afforded the same educational opportunity as other students in your system.

PLAINTIFF'S EXHIBIT 11F

[LETTERHEAD OF DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, OFFICE OF THE SECRETARY, WASHINGTON, D.C. 20201]

October 14, 1970

Dr. Wayne Carle
Superintendent of Schools
The Dayton Public Schools
348 West First Street
Dayton, Ohio 45402

Dear Dr. Carle:

I am responding to your night telegram of October 8, 1970 to Dr. Henderson which has been referred to me for reply. In this telegram you request our interpretation of the underlined [italicized] portion of the following stipulation contained in the DHEW Office for Civil Rights/Dayton Board of Education Agreement on faculty desegregation.

"It is the intention of this Board that each school staff throughout the district will have a racial composition *that reflects the total staff of the district as a whole.*"

During the 1969-70 school year when the agreement to desegregate the Dayton faculty and staff was negotiated and accepted by the DHEW Office for Civil Rights and the Dayton Board of Education, the racial composition of the total

Dayton professional staff was 70 percent white and 30 percent black. Consequently, we would expect that by September 1971, the professional staff at each elementary and secondary school subject to the jurisdiction of the Dayton Board of Education would reflect a racial composition of approximately 70 percent white and 30 percent black. With less than a year to go until the September 1971 deadline perhaps it would be useful to restate the legal basis on which the Dayton Board of Education is obligated to desegregate its teaching faculty.

In *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19 (1969), the Supreme Court unanimously agreed that school districts must end segregation "at once" and operate integrated systems "now and hereafter." See also *Northcross* v. *Board of Education of Memphis,* 397 U. S. 232 (1970); *Carter* v. *West Feliciana Parish School Board,* 396 U. S. 290 (1960). This obligation to desegregate encompasses all facets of the operation of an elementary and secondary school system, including the hiring and assignment of faculty. *Green* v. *County School Board of New Kent County,* 391 U. S. 433 (1968).

The Supreme Court in *United States* v. *Montgomery County Board of Education,* 395 U. S. 225 (1969), reasserted the duty of a school district to desegregate totally its faculty and approved an Alabama district court order which required substantially the same ratio of Negro to white faculty in each school as the ratio of Negro to white faculty in the entire system. In *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211, 1217-18 (5th Cir. 1969), reversed on other grounds, 396 U. S. 290 (1970), the United States Court of Appeals for the Fifth Circuit required school districts to meet these same faculty ratio requirements.

President Nixon in his March 24, 1970, Statement on Desegregation of America's Elementary and Secondary Schools affirmed that segregation of teachers must be eliminated and asserted that "each school system in this Nation, North and South, East and West, must move immediately, as the Supreme

Plaintiffs' Exhibit 11F

Court has ruled, toward a goal under which 'in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system.' " A copy of the President's Statement is enclosed. Consequently, the Department of Health, Education, and Welfare, in its enforcement of Title VI of the Civil Rights Act of 1964, has adopted the same faculty ratio requirement which the Fifth Circuit mandated in *Singleton*, which the Supreme Court mandated in *Montgomery*, and which the President applied nationwide in his March 24, 1970 Statement.

Finally, during 1969 the Dayton Board of Education concluded a voluntary but legally binding agreement with the Department of Health, Education, and Welfare's Office for Civil Rights to desegregate its faculty and staff by September 1971. In agreeing to desegregate voluntarily, the Board waived its opportunity for an administrative hearing on this Office's finding of probable noncompliance. In return for the Dayton Board of Education's agreeing to a negotiated settlement and foregoing a lengthy and costly administrative hearing, this Office, instead of requiring Dayton to transfer immediately many of its professional personnel, permitted a two year period for Dayton to desegregate gradually its faculty and staff and did not require as a condition of settlement that the Dayton School Board admit to the veracity of our March 1969 findings of noncompliance.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely yours,

/s/ FREDERICK T. CIOFFI
Frederick T. Cioffi, Coordinator
Northern and Western States
Education Division
Office for Civil Rights

Enclosure

cc: Chief State School Officer
Regional Civil Rights Director

PLAINTIFF'S EXHIBIT 12

[LETTERHEAD OF STATE OF OHIO, DEPARTMENT OF EDUCATION, COLUMBUS 43215]

June 7, 1971

Dr. Wayne Carle
Superintendent
Dayton Public Schools
348 West Fifth Street
Dayton, Ohio 45402

Dear Dr. Carle:

I am enclosing with this letter a report which has resulted from your earlier request that the Ohio State Department of Education prepare alternatives asked for by the Dayton Board of Education in its resolution of April 29, 1971. As you know, we had previously met with representatives from the Ohio State Department of Development, the Ohio State Department of Urban Affairs, the Ohio Education Association, the Ohio Civil Rights Commission, the Division of Equal Educational Opportunities, the Department of Justice, the Ohio State University, and other organizations, agencies, and individuals to discuss ways of providing such assistance to school systems in Ohio.

Under dateline March 12, 1971, a report was forwarded concerning your earlier request for demographic development of Dayton City Schools enrollment projections for reorganized schools. A team of counsultants and specialists was formed and financed through our Office of Equal Educational Opportunity to assemble data and make recommendations.

Following your most recent request, this team effort was enlarged to include representativs from the Program for Equal Educational Opportunity at the University of Michigan and other university centers. During the weekend of May 7-9,

1971, you, as Superintendent of Dayton's public schools, members of your staff, and experts on school integration from Alabama, North Carolina, Virginia, Washington, D.C., Ohio, and Michigan met to discuss the Dayton schools' problems, to plan strategies for change, and to outline suggestions for achieving the resolution's goals. As the conference proceded, lengthy telephone conversations were held with other experts in Arizona, New Mexico, New York, Illinois, Indiana, Pennsylvania, Wisconsin, and North Carolina. The attached document is one product of that conference and these conversations.

Persons selected for participation in the development of these recommendations were chosen by three criteria in their order of importance: (1) their credentials and backgrounds are impecable; (2) they are personally and professionally committed to quality integrated education; and (3) they are experts in such fields as school administration, curriculum, educational change, jurisprudence, educational planning and development, and human relations. Each person came at his or her own expense, and no reimbursement was either requested or offered.

Many alternatives were suggested. Their range is indicated in this report. Numerous strategies, methodologies, techniques, and possibilities were discussed and catalogued. The team of experts concluded that the resolution passed by the Board on April 29, 1971, was not one which could be dealt with effectively in detail until the Dayton Board commits itself to one of the alternative policies suggested in this report — or to some other which may have been considered, but rejected, as a reasonable action that the Board could take.

As the report suggests, in view of prevailing legal and moral circumstances (the realities referred to on pages 13 and 14), only the one alternative policy is deemed logical and feasible. Therefore, it is the one to which the team of experts devoted their most serious attention.

I recommend, therefore, the following:

1. That the attached document be transmitted as official recommendations from the Ohio State Department of Education to the Dayton Board of Education through their Superintendent;

2. That the Dayton Board of Education be urged to fulfill their collective duty to adopt the recommended policy immediately for correcting "the conditions that offend the Constitution;"

3. That the Dayton Board of Education be informed that if the recommended policy is adopted and ordered implemented — or an alternative policy that would achieve similar results — they can expect to receive continuing assistance from the Ohio State Department of Education and the consortium of other agencies, organizations, groups and individuals referred to above for completing development of strategies, methodologies, and ways of achieving the goals stated in the April 29 resolution; and

4. That upon adoption of the policy by the Dayton Board of Education, the consortium of consultative services which helped to formulate this report be made available to assist the Superintendent and his staff in development of those administrative strategies, methodologies, and techniques essential for implementation of the policy. Once these have been developed formally, the "broadly representative committee" referred to in the Board's resolution would be utilized to evaluate and to advise the Board on such plans.

The request received from Dayton was twofold. I can report also to you that proposals for financial assistance are being developed in accord with the Board's request. A meeting was held today to follow progress of The Emergency School

Assistance funds. Eligibility factors are still cloudy, but one certainly is a definite need for resolutions to be converted into policy statements!

Since Dayton is the first of Ohio's major urban school systems to take this important step toward fulfillment of some of the most basic of American ideals, I personally pledge my continuing support to you and to the school children in Dayton for that fulfillment. I have also been asked to make that pledge for the entire team of persons who have contributed to the preparation of this report.

Dr. Charles Glatt, who gave major direction to these two efforts, has just received official notice that a contract has been signed between the Ohio State University's Research Foundation and the U.S. Office of Education for establishment of The Midwest Institute for Equal Educational Opportunities. As its Director, he also extends that pledge from The Midwest Institute.

Sincerely,

/s/ ROBERT O. GREER
Assistant Superintendent
Urban Education

ROG:mh

cc: Members, Dayton Board of Education
Administrative Staff

[ATTACHED DOCUMENT]

RECOMMENDATIONS OF THE STATE DEPARTMENT OF EDUCATION TO THE DAYTON BOARD OF EDUCATION

School integration is a complex and difficult task; to suggest otherwise would be naive. But it can be achieved by persons with courage, commitment and skill who have the political and professional support of major institutions inside and outside the school. There will be many

times when people committed to integration will experience anxiety, fear, doubt, hostility, and other equally unsettling emotions. Nagging questions will plague the dedicated educator about his effectiveness in creating inter-racial collaboration. This is natural. It is also important to relax, to help yourself and your students accept and work within their own and the school's limitations. Integration can be an enriching and rewarding process for both students and educators. We wish you good luck.

The above paragraph, taken from Planning Educational Change; Integrating the Desegregated School, states succinctly and well the attitude of the Ohio State Department of Education toward the recent request for assistance from the Dayton Public School System for achieving those goals stated in the resolution passed by the Dayton Board of Education on April 29, 1971.

THE BOARD'S POSITION.

The Dayton Board of Education has passed various and sundry resolutions in recent years designed to equalize and to extend educational opportunities, to reduce racial isolation, and to establish quality integrated education in the schools. Many study sessions have been held with the administrative staff, with the community, and with experts from outside the school system. Numerous alternatives have already been suggested, adopted, and in some instances implemented. The latest resolution, passed by the Dayton Board of Education on April 29, 1971, reads:

> WHEREAS the Dayton Board of Education recognizes that unequal educational opportunities for minority students now exist, and
>
> WHEREAS current resources available to the Board have been fully used to extend learning opportunities and are now stretched to their limit, and

WHEREAS the Congress is considering the Emergency School Assistance Program that may supplement other funds for improving education and reducing racial and economic isolation.

NOW, THEREFORE BE IT RESOLVED that the Superintendent of Schools be authorized and directed to request the assistance of the State Department of Education, Office of Equal Educational Opportunity, to provide technical assistance for the development and submission to the Board of alternative plans for reducing racial and economic isolation of pupils and improving educational opportunities in the Dayton Public Schools, and for developing proposals for outside funding to implement the same, subject to the approval of the Board.

BE IT FURTHER RESOLVED that the President of the Board, in consultation with the Board, appoint a broadly representative committee to evaluate and advise the Board on plans that are developed pursuant to this resolution; and to communicate with and seek the cooperation of civic, governmental, higher educational, religious, communications, labor, business, and other segments of the community in the Dayton area regarding such plans.

The Ohio State Department of Education interprets that resolution to mean that the Dayton Board of Education intends, and indeed is legally committed to, achievement of the goals stated therein. The Dayton Board of Education is certainly to be congratulated for their commitment inasmuch as their posture on school integration is completely consistent with currently evolving history of our nation. The paragraphs below indicate that consistency.

THE UNITED STATES SUPREME COURT.

In 1954, the United States Supreme Court held that separate schools are inherently unequal (Brown vs. Board of Education.) In 1968, the Court required that "The burden on a school board today is to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." (Green vs. County School Board.) Mr. Justice Black in 1969 commented: "My belief [is] that there is no longer the slightest excuse, reason, or justification for further postponement of the time when every public school system in the United States will be a unitary one . . ."

In 1971, the United States Supreme Court ruled unanimously: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." The Court also added, "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." (Swann vs. Board of Education.)

THE CONGRESS OF THE UNITED STATES.

The Congress' most notable stand to date on this issue was the Civil Rights Act of 1964 and its later modifications. Most of the Legislative moves on social issues have been designed to correct, to protect, and to assure rights, privileges, and responsibilities of minority children, primarily because of the ill effects of racial isolation, insulation, and discriminaton on the minority child. Damage which results from such factors is not so neatly restricted.

During April and May of 1970, the Select Committee on Equal Educational Opportunity of the United States Senate conducted extensive hearings and collected evidence from a wide variety of researchers, scholars, educators, and other citizens. The basic results of that investigation have been condensed into Section 2 of Senate Bill 683 (92nd Congress, 1st Session): "The Congress hereby finds that the segregation of schoolchildren by race, color, or national origin, *whatever its cause or origin*, is detrimental to *all* children and deprives them of educational opportunity: that conditions of such segregation exist throughout the Nation, and, as a result, substan-

tial numbers of children are suffering educational deprivation; . . ." (Italics not in the original.)

THE EXECUTIVE BRANCH.

Because of some lingering legal and judicial obfuscation, racism, and other related phenomena, all-black and all-white schools may persist into this nation's future. Yet, the *mode* of future education in this nation has clearly been spelled out — our schools will be racially mixed, not those where American children will be segregated by race. The President's Committee on Civil Rights, a quarter century ago, stated: "It is impossible to decide who suffers the greatest moral damage from our civil rights transgressions, because all of us are hurt." Other presidents before Harry Truman had made similar statements, and those who have come after him have concurred. President Lyndon Johnson on November 17, 1965, stated in *Racial Isolation in the Public Schools*:

> Although we have made substantial progress in ending formal segregation of schools, racial isolation in the schools persists — both in the North and the South — because of housing patterns, school districting, economic stratification and population movements. It has become apparent that such programs are more subtle and complex than those presented by segregation imposed by law.

On March 3, 1970, President Nixon stated:

> I am well aware that "quality education" is already being interpreted as "code words" for a delay of desegregation. . . . We must never let that meaning take hold. Quality is what education is all about; desegregation is vital to that quality; as we improve the quality of education for all American children, we will help them improve the quality of their own lives in the next generation.

Representatives of the Office for Civil Rights conducted a Compliance Review of the Dayton Public Schools during November of 1968. As one result of that review, a concern was expressed about evidence of racial segregation among the pupils in the Dayton Public School System:

> The existence in your district of a substantial duality in terms of race or color with respect to distribution of pupils in the various schools, is a matter of concern to us. The fact appears to be that of a total of 5,627 Negro high school pupils, approximately 85 per cent are concentrated in 3 high schools in which the percentage of Negro attendance ranges from 92.3 per cent to 100 per cent. Similarly, 15,479 (approximately 85 per cent) Negro elementary pupils attend 20 out of the 53 elementary schools in your district. It is noteworthy that in 17 of these 20 schools, Negroes constitute 90-100 per cent of the total enrollment.

On January 14, 1971, Mr. Stanly Pottinger, Director of the Office for Civil Rights stated in a memorandum to Chief State School Officers and School Superintendents: "Title VI of the Civil Rights Act of 1964 requires that students in a school district receiving Federal financial assistance be afforded educational services free from discrimination on the ground of race, color or national origin."

THE NATIONAL EDUCATION ASSOCIATION.

Principle 1, section 5, of the National Education Association's Code of Ethics states that the educator "Shall not on the ground of race, color, creed, or national origin exclude any student from participation in or deny him benefits under any program, nor grant any discriminatory consideration or advantage."

The president of the N.E.A., Helen Bain, recently stated:

> The time is now to enforce the "law of the land" by cutting off Federal funds from recalcitrant school districts which refuse to integrate, even if it means a temporary school shutdown. No schooling for a few months is preferable to the kind of degrading and dehumanizing situation whic' many thousands of children suffer daily in segregated schools . . . Each school district in the nation, in order to receive funds from any present or future Federal assistance program, should be compelled to submit a written statement of its commitment to the goal of "quality integrated education."

The Ohio Education Association is in complete opposition to segregation of schoolchildren on the basis of race, color, creed, or national origin. That opposition was stated clearly in the following resolutions passed by the 1970 Representative Assembly of the O.E.A.:

> The Association believes that quality teaching is the basis of quality education for the boys and girls of Ohio. The Ohio Education Association believes that every child, regardless of race, creed, or national origin, has the inherent right to quality education.
>
> The Association believes in the justice of equal educational opportunity within the state and within the nation with control constantly in the hands of local and state authorities. To this end the Ohio Education Association earnestly supports the board general principles of the Ohio School Foundation Program and the federal laws that will accomplish the same for the nation.
>
> The Ohio education Association encourages local boards of education to employ qualified members of minority groups as professional staff members, as paraprofessionals, and as auxiliary personnel.

> The Ohio Education Association believes that when children and youth develop positive relationships with such persons, their appreciation of our country's cultural and racial diversity will be enhanced.

THE NATIONAL PARENT TEACHER ASSOCIATION.

The following resolution was adopted by the National Parent Teacher Association, May, 1969:

> WHEREAS, The National Parent Teacher Association has resolved in its convention resolution "Equality of Opportunity" (1964) "to put forth every greater effort to assure that our constitutional guarantees of human dignity, freedom, and opportunity will prevail for all children" and has reaffirmed this in its convention resolution "The Rights of Citizens" (1965); and
>
> WHEREAS, in view of the deepening domestic crisis, and in recognition that inequities in education, housing, and employment still persist; therefore be it
>
> RESOLVED that the National Parent Teacher Association continue to develop leadership and programs to promote equal opportunity in education, housing, and employment.

THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS.

The Official Platform of the American Association of School Administrators states:

> As educators we believe –
>
> 1. That the primary purpose of education in the United States of America is the development of each individual for the fullest participation in the American democratic way of life.
> 2. That universal free education must be made available to all peoples of every race, color, and creed

in the interests of intelligent citizenship, world understanding, and peace.

3. That the American democratic way of life can be perpetuated (a) through universal free education which provides equal opportunities and is fitted to the abilities, interests, and needs of each person and of the society in which he lives.

• • •

In order that these principles may be realized, we, as school administrators, propose to work for –

• • •

8. The elimination of barriers that present full access to equal educational opportunity for all children and the provision of educational leadership in eliminating discrimination against any segment of our society.

THE NATIONAL SCHOOL BOARDS ASSOCIATION.

The National School Boards Association adopted the following resolution during the NSBA Delegate Assembly at Miami Beach, Florida, April 12-15, 1969:

> The National School Boards Association urges that state school boards associations initiate and support, in cooperation with other responsible state-wide associations, continuous study and action programs to improve state laws related to the twofold task of raising and distributing tax revenue for public education. The solutions evolved should reflect concern for:
>
> a. programs designed to meet the education needs of all public school children.
>
> b. state aid formulas that compensation for such factors as:

(1) The disparity among school districts in resources available for public education.

(2) The disparity among school districts in effort expended.

(3) The disparity among school districts in the cost of providing comparable programs in urban, suburban, and rural areas.

(4) The higher cost of educating those children with exceptional needs of all kinds wherever found.

(5) The extra cost of quality programs.

c. achievement of an appropriate intergovernmental sharing of the cost of public education based on equitable measurement of need, effort, and resources.

d. development of an equitable, efficient tax system that balances the progressive and regressive factors in the various methods of taxation, in order to provide adequate revenue for education without inequitable tax burdens.

THE DAYTON CLASSROOM TEACHERS' ASSOCIATION.

The Executive Committee of the Dayton Classroom Teachers' Association passed the following motion *unanimously* at its April 12, 1971, meeting:

> WHEREAS: The Dayton Classroom Teachers' Association has endorsed the concept of quality integrated education for all Dayton School children, and
>
> WHEREAS: The United States Supreme Court has decreed that equal educational opportunity is an inherent right of all American Citizens, and

> WHEREAS: The President of the United States has asserted his intention to enforce these constitutional rights,
>
> THEREFORE BE IT RESOLVED that the Dayton Classroom Teachers' Association Executive Board demand that the Dayton Board of Education enter into negoitations with the United States Office of Education to develop and to adopt a comprehensive student plan that will result in the desegregation of the Dayton Public Schools . . .

Many other individuals, agencies, committees, commissions, associations, public bodies and organizations have taken the same basic stand in this country relative to racial discrimination. The above statements are but a small sample of the movement in American society to assure that the American ideals become reality for all citizens.

THE POSITION OF THE OHIO STATE DEPARTMENT OF EDUCATION.

Section 7.06 of Division One of *Drury's Ohio School Guide* serves as the preamble for the position of the Ohio State Department of Education's position on this issue:

> Laws providing for the education of children are for the protection of the state itself. The primary purpose of the maintenance of a school system is the promotion of the general intelligence of the people constituting the body politic, and thereby to increase the usefulness and efficiency of its citizens, on which the government of society depends.

Members of local boards of education, as lay men and women, often do not have time and opportunity to learn all they should know in order to function effectively in their elected or appointed positions. Consequently, they commonly rely on recommendations made to them by others who are

also very busy, on public opinion, on the news media, and on various other sources for information basic to decision-making. An important aspect of educational mythology in America is the notion of "local control" of public schools. Although local boards of education have rather broad discretionary powers to formulate policy for many of the educational activities in a given geographical area, those powers are *delegated* by the State. When a local board acts, it is acting as an arm of the State. In Ohio this has been explicitly clarified by the Legislature:

> The organization of the public school system of Ohio is by districts, each governed by its own board of education, which districts are organized to promote education and carry into effect the provision of the Constitution in respect thereto.
>
> A school district is a political organization unknown to the Constitution, the mere creature of legislative enactment, and organized *as an agency of the state* in maintaining its public schools, all of its functions being of a public nature. It is merely a geographical division of territory devised for the convenience of its inhabitants, and a mere territorial and political division of the *state* established exclusively for public purposes, and connected with the administration of local government, through a system of local management and control of the public schools. (*Drury's Ohio School Guide*, Section 2.01, italics not in the original.)

We add, parenthetically, that the phrases *de jure* and *de facto* are, in a very real sense, unknown to the Nation's highest court and its consistent interpretations of the Constitution. Neither phrase has been utilized in any Supreme Court decision relative to schools except in Swann et. al. v. Charlotte-Mecklenburg Board of Education et. al. (April 20, 1971), where the phrase "so called 'de facto segregation'" appears. Other terms have been employed such as "dual schocl sys-

tems," "unitary school systems," "separate but equal," "admission to public schools as soon as practicable on a nondiscriminatory basis," "state enforced discrimination," "equal protection guarantees of the Constitution," "powers to remedy past wrongs," "equitable remedies to repair the denial of a constitutional right," and "to correct . . . the condition that offends the Constitution." The one phrase that has permeated every major Supreme Court ruling on desegregation of schools is "state imposed segregation by race in public schools which denies equal protection of the laws."

> *School districts are agencies of state government. They are created to carry out the constitutional requirement to provide a system of public education.* A school district is a quasi-corporation. It is a political or civil division of the state; it is established as an agency or instrumentality of the state for the purpose of facilitating the administration of government. Education is a government function. *A school district functions in the execution of state government or state policy.* It possesses limited powers. The powers, duties and liabilities of a school district are only such as prescribed by statute. It has not common law powers.
>
> *Since education is a state function, completely under the control of the state legislature,* except as it may be restricted by the state or or [sic] United States Constitution, the legislature may authorize the creation or alteration of school districts as *state agencies* in such manner as it deems advisable. Clearly, however, the legislature cannot directly administer the state educational system. It must create agencies to carry out its policies and must *delegate* to them much of its authority. (Ibid.)

Each member of the Dayton Board of Education either swore or affirmed that he or she would support the Constitution of the United States and the State of Ohio, and that he

or she would faithfully and impartially discharge his or her duties to the best of his or her ability. The Board is a continuing arm of State government, regardless of its constituent membership at any particular point in time.

As the resolution of April 29, 1971, admitted, "the Dayton Board of Education recognizes that unequal educational opportunities for minority students now exist." Inequality of such opportunities, for minority *and* majority students, has characterized the Dayton public school system throughout its history.

Since the Board, *as an agency of state government,* has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative duty to comply with the Constitution; that is, as the Supreme Court has stated, "to eliminate from the public schools all vestiges of state-imposed segregation." The Court added to that remark:

> Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be protected by the remedial measures of *Brown II.* That was the basis for holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated *root and branch.* (*Swann* v. *Board of Education, op. cit.,* Section III; italics not in the original.)

Lest any doubt remain that the Dayton Board of Education has such an affirmative duty, the Supreme Court's own check list is presented here:

> In *Green,* we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most

important *indicia* of a segregated system. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

When a system has been dual in these respects, the *first* (italics not in the original) remedial responsibility of school authorities is to eliminate invidious racial distinctions.

* * *

The construction of new schools and the closing of old ones is one of the most important functions of local school authorities and also one of the most complex.

They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.

In the past, choices in this respect have been used as *a potent weapon for creating or maintaining a state-segregated school system.* In addition to the classic pattern of building schools specifically intended for Negro

or white students, school authorities have sometimes since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. (*Ibid.*, Section IV; except for names of court decisions, italics were not in the original.)

The Ohio State Department of Education congratulates the Dayton Board of Education for being the first of the State's large urban school systems to move affirmatively toward elimination of racial isolation and its evil effects. The desire to move beyond just that and to deal affirmatively with economic isolation is even more commendable. As one lady said to the Board in a recent meeting, "if it ever was a time when we need to get together, now is the time."

The State Department of Education presents its suggested alternatives and recommendations to the Dayton schools based on three "realities" of contemporary America:

1. The laws of the State of Ohio as they relate to the Board's duty. ("It is unlawful for a board of education to provide separate schools or classes in the public school system because of the racial origin, creed, or color of the pupils. A superintendent of schools,

and a board of education, has no legal authority to make any distinction because of such matters in the assignment of pupils to schools, or the determination of the boundary lines of school areas. While the discretion of a board is broad, it does not extend to segregation of pupils on grounds of race or color. The repeal of the former law in this state providing for separate schools for colored children clearly showed the intention of the legislature to take away from the boards of education any such distinction between white and colored children.) (*Drury, op. cit.*, Section 7.47.)

2. The Constitutional requirements spelled out in the Supreme Court decisions related to guarantees of equal protection for all American citizens. (In *Swann* v. *Board of Education*, the statement was made: "Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. *At no time* has the Court deviated in the slightest degree from that holding or its constitutional underpinnings.")

3. The lack of opposition to the intent of the Board's resolution of April 29, 1971.

The first two of these realities have been examined at some length previously in this document. Number 3 has also been documented amply. Some members of the currently composed Dayton Board of Education have consistently and persistently pursued a policy of eliminating racial and economic isolation, of equalizing and extending educational opportunities for all children, and of establishing stable, quality, integrated schools. Other members of the Board have been less outspoken in such support for these goals, yet have consistently and persistently denied their opposition to integrated education. Even those who have been less articulate in their positive support for

integration have introduced resolutions to the Board with sections such as the following:

> Be it therefore resolved, that the policy of this 1970 Board of Education shall be as follows:
>
> 1. That every reasonable and constructive means that can be effected will be taken for the ultimate elimination of racial imbalance in our neighborhood schools."

The Superintendent of Dayton's public schools has given unwavering support for accomplishment of these goals, often in the face of devious and outspoken efforts to thwart their attainment. His administrative staff has also supported the quest for such fulfillment of goals. Even one of the most verbal of the Superintendent's staff, the President of the Serving Our Schools committee, stated in an interview reported in the *Dayton Daily News* on April 28, 1971: "I'm never against any kind of change if it proves to be for the betterment of the child in the community, . . . I think the school is run on a philosophy. Changes come under that philosophy. Of course, it's *quality education for all.*" (Italics not in the original.)

Support in the community for quality integrated education is strong. No one denies their support for that goal. At the March 18, 1971, meeting of the Dayton Board of Education a local pastor was called upon by one board member to speak for the East Dayton community. To the entire Board of Education he stated: "We feel that you are hiding behind the vicious smoke screen that we do not want integration. That is not so . . . I totally reject such a statement."

Every voice that has been raised publicly in the Dayton community has expressed support for integrated education. The major obstacle appears to be the selection of methods and strategies for achieving the goal. In view of these positive attitudes and commitments, Ohio laws, and Supreme Court rulings, the following alternatives are suggested. All have

been proposed, discussed, and evaluated by various individuals and groups in the community during the past several years.

ALTERNATIVES FOR REDUCING RACIAL AND ECONOMIC ISOLATION OF PUPILS AND IMPROVING EDUCATIONAL OPPORTUNITIES IN THE DAYTON PUBLIC SCHOOLS.

1. *The Board could choose to do nothing.* The Board could assume the posture that the Dayton School District has done nothing nor has permitted anything to be done which has led to segregation of children. However, the Board has publicly gone on record as desiring quality integrated education and has publicly admitted that the district is guilty of practices which have led to segregation of schoolchildren. The Ohio State Department of Education recommends that the Dayton Board cannot take this stance, but rather that the board has an affirmative duty to correct those practices and policies which offend the Constitution.

2. *The responsibility could be passed to the 1972 Board of Education.* Inasmuch as voters in the Dayton School district will be selecting persons again in November of 1971 to constitute the Board after the year's end, the current Board members may not want to be the individuals who collectively will initiate a legally and morally proper course of action, one based on the most fundamental ideals and principles for which this nation was founded. The currently composed Board could elect to pass the torch and, in effect, abdicate their responsibilities. However, regardless of who occupies the seats, guilt has been evidenced and the corrections must be made.

3. *All incumbent Board members could resign.* Responsibility for achieving the ideals could be returned to the State where ultimately it belongs. Ohio law permits this to occur and specifies the method. "If the board of education of any

city, exempted village, or county school district fails to perform the duties imposed upon it . . . the probate court of the county in which such district is located, upon being advised and satisfied of such failures, shall act as such board and perform all duties imposed upon such board." (Drury, *op. cit.*, Statute 3313.85.)

4. *Delaying tactics could be continued.* The Board, in spite of resolutions and overt commitment, could choose to make only the lightest mandated changes, and to utilize the best legal talent available to resist compliance with constitutional requirements. Other school districts have chosen this alternative, even as Dayton has used similar methods in the past. However, the highest court in the land has stated the constitutional offensiveness of state-imposed segregation of schoolchildren, and persisting delay clearly violates the oath of office of members of the Board of Education in the state of Ohio.

5. *Existing policies could be magnified and expanded.* For example, the Dayton Board of Education could expand the freedom of enrollment policy and pay the transportational costs for those youngsters who elect to make the majority-to-minority transfer. This is permissible as *one aspect* of a comprehensive plan according to the Supreme Court. "In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move." (Swann vs. Board of Education, *op. cit.*, Section V). However, Ohio law "does not grant to pupils the right to select the particular school to be attended within the district of his residence." (Drury, *op. cit.*, Division One, Section 7.04.)

6. *Some racially identifiable schools could be preserved.* All-black and all-white schools may be allowable in certain instances because of residential patterns or because of psychological needs of persons who are willing to pay the costs of such volunteer segregation. If that course is followed, the Board should study carefully Section V, part 2, of the Swann

vs. Board of Education ruling by the United States Supreme Court before making such a decision.

7. *The Board could seek a mandate from the Courts.* For example, the Board could elicit the help of citizens or citizenry groups to prepare a legal suit against the Board as an agency of state government and give to them all of the evidence and help necessary for winning the case in Court. In view of the Board's resolution, however, this does not appear to be a necessity. The Board again is to be commended for attempting to accomplish voluntarily what is legally and morally proper since the Board apparently intends to fulfill its affirmative duty to do more than just remove those vestiges of state-imposed segregation which offend the Constitution.

8. *Elimination, renovation, and construction of buildings could become the major vehicle for accomplishing the goals.* Older buildings *could* be eliminated and newer ones expanded or constructed in areas where, by design, they could easily be integrated racially and economically. Lack of financial resources currently seems to prohibit this alternative from becoming such a vehicle in the near future.

9. *The Board could opt for utilization of the "voucher" plan.* Some monies are available through the United States Office of Education under the so-called "voucher" plan. The Superintendent could be directed to seek such finding and also to ask the Ohio State Legislatures for permission, in effect, to close the public schools and to provide finances for students to select their own facilities for educational experiences. The conflict between Federally sponsored innovative programs and the legislatively imposed duties and responsibilities of school boards in Ohio seems to preclude this alternative as one that merits serious attention.

10. *The Board could require racial balance of students in each school.* Through the legally binding contract negotiated between the Dayton Board of Education and the Office for Civil

Rights, each school's faculty will be composed of approximately the same proportion of black to white as characterizes the entire system. With slight modifications, that was the policy adopted by the Board of Education in Charlotte-Mecklenburg, North Carolina, for both faculties and students. And, quite legally, any board of education could adopt such a policy. At least four factors suggest this to be an unreasonable alternative for the Dayton school district:

a. The United States Supreme Court, in Swann vs. Board of Education, stated: "The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

b. Although exact mathematical formulas may be easy to derive and even to implement, they are very difficult to maintain. Unforeseen events such as population movements, accidental or deliberate destruction of buildings, changes in rates of student attrition, or development of attractive private schools can easily turn the school administrator's role into a very difficult one if racial balance of students becomes the system's policy.

c. The financial costs of exact racial balance could become prohibitive, especially if additional transportation is required.

d. The Supreme Court again has stated: "An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significanctly impinge on the educational process." (*Ibid.*)

11. *The Board could adopt as policy the "parameters" concept.* During December of 1970 a series of three study sessions was held between the Dayton Board of Education, the administrative staff, and other invited personnel. In one section of the document entitled *Integrated Education* produced

for those sessions an approach to strategies for accomplishment of these goals was recommended: "Parameters and the Future." The purpose of that presentation was to recommend changes in the Dayton School District's organization that were designed to improve the quality educational experiences and to equalize and to extend opportunities for those experiences.

After searching for, cataloguing, and examining the other alternatives described above, the Ohio State Department of Education officially recommends to the Dayton Board of Education the basic ideas employed in development of "Parameters and the Future" as the most reasonable and educationally sound of those policies which the Dayton Board could adopt. If that posture is assumed by the Dayton Board of Education, acting as an agency of Ohio State Government, a comprehensive plan can then be developed for implementation of the policy which will be constitutionally valid and inoffensive, educationally sound, and morally proper. An overview of such a plan is presented here; details, of necessity, can be developed only after the Dayton Board of Education has officially decided its course of action.

AN OFFICIAL RECOMMENDATION TO THE DAYTON BOARD OF EDUCATION FROM THE OHIO STATE DEPARTMENT OF EDUCATION FOR REDUCING RACIAL AND ECONOMIC ISOLATION OF PUPILS AND IMPROVING EDUCATIONAL OPPORTUNITIES IN THE DAYTON PUBLIC SCHOOLS.

Basic assumptions. This document is presented on the following basic assumptions:

1. That many of a child's most important lessons are learned very early in life, especially those affective learnings which shape values, attitudes, appreciations, interests, and aspirations;

2. That students in the Dayton public schools are living and learning in a community that currently is characterized by social and geographical insulation and isolation as these relate to race and economy. This results in a form of cultural conditioning that impedes and restricts inter-racial understanding, appreciations, and cooperation;

3. That schools, as suggested by the United States Supreme Court, cannot be separate and equal. More importantly, children isolated racially and economically in schools cannot learn the most essential lessons needed for effective participation in a democratic society;

4. That as occupational opportunities are expanded for persons who previously have been economically restricted, other national goals such as increased vocational opportunities and open housing will be accomplished. Yet, the schools cannot wait on other agencies of government and societal institutions; educational institutions, by a series of legal and judicial thrusts, have been positioned on the front edge of social change. If the schools' leadership fails, both white and black neighborhoods are apt to become "embalmed ghettoes;"

5. That the occupational, political, social, and higher educational world to which Dayton's young people will graduate will be one in which inter-racial experiences are commonplace and ordinary;

6. That the problems inherent in racial and economic isolation cannot be solved unless an appreciable proportion of minority children are involved, whether they be black in previously all-white schools, or white in previously all-black schools;

7. That in order for any intermediate steps to be successful, commitment to the final goal of ending racial and economic isolation and insulation is essential;

8. That if the schools' task of preparing young people appropriately and adequately for adulthood is to be achieved in Dayton, racial and economic isolation and insulation in the public schools must be eliminated root and branch, and

9. That a plan should be designed (1) to improve the quality of educational experiences as the opportunities for educational experiences are equalized and extended; (2) to eliminate racial and economic isolation and insulation as completely as possible; (3) to involve all facets of the total educational enterprise in pursuit of a common goal; (4) to provide opportunity for involvement in the decision-making process to those persons most directly affected by the changes which result; and (5) to provide for future planning and development that will minimize the possibilities of racial and economic isolation and insulation redeveloping.

Factors influencing a comprehensive plan. Plans designed to eliminate racial and economic isolation and insulation in the Dayton School District must take into account the following factors:

1. With few, if any, exceptions currently existing school building are structurally sound and usable.

2. A practically impenetrable residentially segregated living pattern of blacks and whites exists in the school district.

3. About 80 per cent of all black students reside in the area bounded by Wolf Creek on the North and the Miami River on the East. The residential districts North, Northeast, and due East of this area are almost 100 per cent white, with the exception of the changing Dayton View neighborhood immediately north of Wolf Creek.

4. Attitudes of polarization and separatism apparently are

growing among some black and some white segments of the population;

5. Recent school elections, tax levies, and bond issues seem to indicate an extremely conservative community attitude in some sections of the city.

6. The ideals and commitments which are deeply embedded into the American way of life by the Constitution of the United States, by Congressional enactments, by Executive decrees, and by Judicial decisions.

7. The potential impact that decisions made in 1971 will have on longer ranged plans and the future of public education in the Dayton Metropolitan Area.

8. The affirmative duty that the Dayton Board of Education, as an agency of state government, has to correct inequities from the past and to preclude the possibility of similar inequities developing in the future.

Criteria for educational development. For practical reasons, future educational developments in Dayton should be made in view of the following criteria:

1. For budgetary reasons, a feasible plan should require a minimum of school plant conversion.

2. For the same reasons, transportation costs and the time involved in transportation should be minimized.

3. School developmental plans should provide for full opportunities for leadership and extracurricular experiences for all pupils.

4. Plans to eliminate racial and economic isolation and insulation should also incorporate components which can take advantage of public transportational patterns.

5. Plans to eliminate racial and economic isolation should provide workable parameters within which to operate.

These parameters should reflect the assumption that an appreciable number of minority children are involved in all of the schools.

Components of the plan. Improvement of educational quality and elimination of racial and economic isolation in schools are a series of interrelated processes that involve all aspects of the educational process. Deliberate planning in many areas is essential to success, and success has to be planned for and built into the plans. The major components included here are:

1. Community involvement.
2. Students
    a. Elementary schools
    b. Middle schools
    c. Secondary schools
3. Teaching faculties
4. School staffs
5. Central Office staff
6. Curriculum
7. In-service development
8. Staff recruitment
9. Buildings and facilities
10. Finance

Stages of implementation. If simple mixing of physical bodies as a means of satisfying social and political pressures had been the intent of the Dayton Board of Education, development of a plan for achieving that goal would have been an easy task to be accomplished in one fell swoop. However, improving the quality of education, eliminating racial and economic isolation and insulation, unifying efforts in pursuit of a common goal, involving persons affected by changes in decision-making, and minimizing possibilities for isolation and insulation to redevelop are not easy tasks nor can their achievement be a simple one-step process. Several stages of implementation should therefore be expected.

Methods. The means, strategies, methodologies, and techniques whereby the goals subscribed to in this document can be achieved are limited only by vision, imagination, commitment to quality in education, and concern for children. No one method could begin to accomplish these goals, and any one method independent of others would at best be tokenism.

The recommendation is made here that a wide variety of citizens, teachers, learners, and facilitators of learning be invited to discuss and to recommend methods to supplement those suggested herein.

Quality education has sometimes been interpreted as a learner sitting at the feet of a master teacher and receiving knowledge and wisdom from that master teacher. A more realistic view of quality education, one supported by a century of experimentation, research, and study indicates that youngsters learn through transaction with all components of the educational environment. The Dayton Public Schools have to some extent been committed to this latter view. Some of the environmental components might be illustrated by the diagram on the following page.

A plan for Dayton's schools compatible with the preceding sections of this document ought also to be based on these premises:

1. That each child should have access to the best teachers available;
2. That many of the most important lessons essential for participation in a democratic society are those which youngsters learn through transactions with other students;
3. That physical facilities exert notable influence on learning;
4. That accessibility to unbiased learning materials is es-

sential to improvement in quality of educational experience;

5. That curricular development must be a continuing process influenced by national goals, community needs, individual aspirations, and sound learning theory;
6. That when the school and the community harmonize their efforts, the potential for improvement of educational quality is best enhanced; and
7. That maximum learning achievements can be expanded for all children as efforts are made to provide better education for previously disadvantaged children.

Community Involvement. This document recommends for future educational planning that the people who comprise the greater Dayton community be involved more than they have been previously in the activities of the schools. Current efforts can be expanded and innovative practices can be implemented.

The following recommendations are made specifically for immediate implementation if this plan is adopted as policy by the Board of Education:

1. A community advisory committee be established to be composed of the wide range of persons suggested in the April 29, 1971, Board resolution.
2. The community advisory committee be asked specifically to perform the following task: to establish dialogue with the citizens they serve in the community as a means of eliciting suggested methods for implementing those facets of the plan which involve:

   public relations
   community support for the schools
   elimination of racial and economic isolation in all white and all black neighborhoods,
   promotion of good human relations in the schools, and
   coordination of social action between school and community

3. The Citizen's Advisory Councils for each public school in Dayton be requested to sponsor open forums to elicit recommendations from parents and other citizens for methods of implementing pertinent facets of this plan.
4. The Community Advisory Committee and the Citizens Advisory Councils be asked:
   a. to report their initial recommendations to the Superintendent of Schools no later than six weeks after appointment of the Advisory Committee; and
   b. to report recommendations that relate to longer ranged goals established by the Board no later than six months after appointment.
5. The Superintendent of Schools be charged with the responsibility of:
   a. reporting within one week after Board adoption of suggested policy to the citizens of the Dayton area *via* television, radio, the press, and other media the essential components of this plan; and
   b. requesting that other citizens who are willing to offer suggested methods for implementation of the plan submit their suggestions to the Superintendent's office by postal service within one month after Board adoption.
6. Recommendations received from these groups and organizations for implementation of the plan be channeled by the Superintendent to appropriate school authorities and study committees for evaluation and possible incorporation.

Other Components of the Recommended Policy. The document, *Integrated Education*, introduced to the Dayton Board of

Education in December, 1970, included an outline of the other components of the recommended policy. Repetition here is not necessary. However, the following activities and goals are stated explicitly as part of this formal set of recommendations.

1. Any change in the racial and economic composition of a given school's student population between the date that this document is received and September, 1971, should be toward reduction of racial and economic isolation, or toward the system-wide proportion of black to white and affluent to poor.

2. Any additional methods deemed educationally sound and economically feasible by the Superintendent and his staff which can reduce racial and economic isolation should be implemented.

3. By no later than September of 1972 the student racial composition of each of Dayton's public schools will be within the general parameters of fifteen per cent plus or minus the averages of black students in the elementary, middle, and high schools. (Judge James B. McMillan stated in Swann vs. Board of Education: "The assumption . . . that a school is desegregated when it has as many as 10 per cent of a minority race in its student body is not accepted by the Court, and neither the Board nor the Court should be guided by such a figure." The United States Supreme Court upheld his view unanimously.)

4. A team of outside consultants with appropriate experimental backgrounds should be invited to review:

   a. all existing policies of the Dayton Board of Education to determine their appropriateness for an economically and racially integrated school system and to make recommendations for needed changes in those policies;

   b. all existing administrative procedures of the Dayton school system to determine their appropriateness for an economically and racially integrated school system and to make recommendations for needed changes in those procedures; and

   c. all handbooks, directives, and administrative procedures being utilized in individual schools to determine their appropriateness for economically and racially integrated schools and to make recommendations for needed changes.

5. The administrative staff, in conjunction with outside consultants, should continue to develop and to have ready as soon as possible proposals for obtaining funds to help finance implementation of this comprehensive plan. Such proposals should be developed for possible acquisition of funds from a wide variety of sources including, but not limited to, the Federal government.

6. The divisions and apparent animosities which have characterized many of the activities of the Dayton Board of Education in the recent past should be placed aside, and, as an arm of the Ohio State government, the Board should move immediately and affirmatively to adopt as policy and to order implemented into practice this recommendation for achieving the goals stated in the Board's resolution of April 29, 1971.

7. On January 15, 1971, a request was presented to the Ohio State Department of Education from the Dayton school district for consultation and assistance in reorganizing the system to include middle schools. A set of recommendations from the Ohio State Department of Education relative to that request was transmitted to the Dayton school district along with a letter dated March 12, 1971. On page 5 of those recommendations, under Alternative 5, section f, the following statement appeared:

> In areas of the school district where surrounding housing patterns are racially segregated, any set of schools involved in the conversion process should be designated as "magnet" schools and at least fifteen (15) per cent of the classroom and other space and facilities of the schools should be reserved for voluntary transfers by minority students as the administration may deem necessary to relieve overcrowdedness or to implement programs designed to meet special needs.

That particular recommendation apparently was ignored by the Dayton Board of Education. Of the five sets of schools currently involved in the process of conversion to feeder and middle schools, the following seems to be occurring:

1. two sets of schools will be totally black;
2. racial isolation will actually be increased in one set of schools; and
3. only in the Dayton View area, which was previously integrated, could conversion to middle schools possibly result in reduction of racial and economic isolation and insulation.

If what appears to be happening with middle schools is in fact happening, then Dayton has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur.

This report concludes with statements made recently by three men who won the governorships of states in the South. James Earl Carter, Jr., 76th Governor of George, said: "I say to you quite frankly that the time for racial discrimination is over. Our people have already made this major and difficult

decision. No poor, rural, weak, or black person should ever have to bear the additional burden of being deprived of the opportunity of an education, a job or simple justice."

On January 17, 1970, the first Republican Governor in nearly a century said in his inaugural address to the people of Virginia: "Let the goal in Virginia be an aristocracy of ability, regardless of race, color, or creed."

In Arkansas, Dale Bumpers' avowed reason for entering the gubernatorial race was to prevent segregationist and former governor Orval Faubus from regaining office. He asked, "How could I face my children and grandchildren if I allowed that to happen without a fight?"

The Dayton Board of Education again is to be commended for the action it is taking an affirmative stand to correct segregation which has been imposed on schoolchildren in the district. Accomplishment of the goals will not be easy. Defeat is possible if strength falters or if commitment fails. Governor Bumpers' statement can be paraphrased for the Dayton Board of Education: "How could you face your children and grandchildren if you allow that to happen?"

Finally, the Ohio State Department of Education recommends that the model for staff, student, and community development currently being planned for *Project Emerge* in the West Dayton area become the pattern for the entire district. Only two components of that model are presented here (staff and community) since final development of the third component must await action by the Dayton Board of Education relative to integration of students. A preliminary outline is attached to this set of recommendations.

PLAINTIFFS' EXHIBIT 13A

Mr. Robert Kline, Chairman
Board of Education, City of Dayton
348 W. First Street
Dayton, Ohio 45402

Sir:

In May, 1954, the Supreme Court of the United States held, in the now historic Brown vs. Kansas City School Board case, that . . . "to separate them (Negro Children) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal."

Within the City of Dayton, those schools located in the area bounded on the North by Wolf Creek, on the South by Nicholas Road, on the East by the Great Miami River, and on the West by Oberlin and Elkins Avenues are as "segregated" *in fact*, as they would be under the force and effect of the law. Further, all of the debilitating effects of the "separate but equal" school system of the Southern states exist and accrue to the permanent disadvantage of the predominantly Negro students of the schools in the above area.

In the 10 year period since the Supreme Court Ruling, there has been a marked absence of any definitive action or program by the Dayton School Board to abolish segregation in the City's schools. In fact, the observable actions of the school board have solidified the patter of segregation. The locating of the new Dunbar High School in the middle of one of the worst "slum areas" in the United States and in an all-Negro school district is a case in point. More recently, the construc-

tion of McNary Elementary School in an all-Negro community can only be interpreted as a deliberate plan on the part of the school board to perpetrate segregation in Dayton's schools.

We are aware of the fact that housing segregation contributes to school desegregation. But the opposite is also true. White Suburbia could become integrated if school boundaries were redrawn to include Negro residents.

Analyses and rationalizations which justify maintaining the status quo are no longer acceptable. The problem can no longer be dismissed with a glib answer. Negro parents and Negro students demand changes. School segregation, whether de facto or de jure, permanently handicaps the Negro.

The problem is intricate and complex and there are no simple solutions. The responsibility is clearly yours to find solutions. What action are you taking, and what plans have you formulated to solve this problem? The upgrading of teachers and facilities within the segregated schools (and there is no evidence of even this) is not a satisfactory long term solution since "separate" never really becomes "equal."

We invite the urgent attention of the entire board and administrative officials to this matter and request your prompt reply concerning your proposed plan of action.

Dayton Alliance for Racial Equality

Charles E. Tate, Chairman
529 Gramont Avenue
Dayton, Ohio 45407

cc to:
Mr. Robert French

PLAINTIFFS' EXHIBIT 13B

[LETTERHEAD OF THE DAYTON PUBLIC SCHOOLS]

October 19, 1965

To: Members of the Board of Education
From: Robert B. French, Superintendent

At the recent meeting of City School Superintendents in Memphis, the chief topic of discussion centered around the encroachment of the federal government in local schools. Four cities have been warned that they are in violation of the Civil Rights Act, but these cities have been unable to find out in what way they are in violation. These cities feel that they have been found guilty by the press and television and have had no chance to answer allegations. The Commissioner of Education, when asked to give guide lines for integration, was unable to do so except to say that he would expect new construction to be so placed that it would facilitate integration.

Another subject of considerable interest was the growing militancy of teachers' organizations and their tendency to want to deal directly with the Board of Education in all matters.

The most talked about type of school organization for the future is the Kindergarten-4, 5-8, and high school 9-12.

Jack Crowther, Superintendent at Los Angeles, gave a graphic account of recent riots and how the schools coped with the situation.

Memphis is one of the modern southern cities. It has experienced rapid growth and construction is going on on all fronts. They have recently completed a 40,000 seat stadium, large field house and a modern Board of Education building, housing one of the most sophisticated data processing systems in the country.

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PLAINTIFFS' EXHIBIT 13N

[LETTERHEAD OF NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE]

November 15, 1954

Mr. Robert B. French,
Superintendent of Dayton Public Schools, and
Members of the Dayton Board of Education
232 North Main Street
Dayton 2, Ohio

Dear Mr. French and Board Members:

Some months ago, the Dayton Branch of the National Association for the Advancement of Colored People, requested that you re-examine the patterns of segregation that existed in our Dayton schools in the light of the May 17th, Supreme Court decision out-lawing segregation in public schools.

This request was not made exclusively for any special benefit that would accrue to the Negro child or teacher as such, but rather on an over-all benefit to all Dayton, in that our great City, who has demonstrated time after time that it could meet and conquer any industrial or community challenge; can also meet the challenge hurled at our City by our Supreme Court when it unanimously said: "We have now announced that segregation is a denial of equal protection of the law. Segregation which separates them from others of a similar age and qualification solely because their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone."

Chester Bowles, ex-Governor of Connecticut, and former Ambassador to India said, "The question asked over and over from Lebanon to Japan by two-thirds of our world's population: Its racial discrimination against your own colored citi-

zens. The colored peoples of the world simply cannot think about the United States without considering bitterly the limitations under which 15,000,000 Americans with colored skins are living. Mr. Bowles went on to remind us that just recently Secretary of Defense Charles E. Wilson whose business genius Dayton and the world reveres and respects, ordered an end to all segregation of school children on all U. S. Military posts by September 1, 1955. It is interesting to note that all segregation in the United States Army has ended ahead of schedule. Mr. Bowles goes on to say: Moreover, any fair minded student of the facts must agree that the inability of the South to solve fully its profoundly difficult problem is no worse than the inability of the rest of the Country, under far easier circumstances to clear up its own shoddy record.

To those of you who may think that the American Negro is impatient, we would like to remind you that on January 1, 1963, we will celebrate 100 years of emancipation. How far we will have come by the close of that century toward full freedom for all Americans? Any great change takes time, but 100 years is a long, long time. In these days, it seems long enough to accomplish almost anything. A century ago, half the world was dominated by European masters, our Pacific west was being opened to settlement. Free compulsory public education was still a new and questionable proposition, the automobile, airplane, and mass production, which have remade our world was unknown. Looking back, the changes and achievements are breath-taking.

If all this can be done in one century, surely 100 years is time enough to see that American Negroes receive the full rights and dignity to which every man is entitled under a democratic government.

The Dayton Branch of the National Association for the Advancement of Colored People, wishes to request again that in view of the indisputable facts that segregation in school membership and teachers does exist in our Dayton School System, and that Washington D. C., and that even many

other Southern states have taken steps to abide by the decree of the Supreme Court decision, that it does appear that the Dayton Board of Education would give due consideration to plans that would end this un-American school segregation. It is our studied opinion that Dayton, as we have stated before, who has so gloriously met challenges of floods, city income tax issues, and slum clearance, would be glad to join and support you in a program that would show that we in Dayton can solve by a democratic method a dee-rooted injustice quickly and peacefully.

The National Association for the Advancement of Colored People reminds the Dayton Board of Education finally of the words of Alan Paton, author of "Cry The Beloved Country, As America accepts the Negro more and more fully, will the strength be poured into herself, so that she can play more surely her role in the world?"

Sincerely yours,

/s/ CHARLES J. FRANCIS
President
Dayton Branch, NAACP

/s/ MILEY O. WILLIAMSON
Executive Secy.
Dayton Branch, NAACP

PLAINTIFFS' EXHIBIT 15A

DAYTON PUBLIC SCHOOLS

Roosevelt-Colonel White Optional Area Enrollments, 1963

Colonel White

Students from Roosevelt-Colonel White optional area attending Colonel White, 1963:

White	361
Black	6
	367*

Racial composition of Colonel White High School, 1963:

White	98.9%
Black	1.1%

Roosevelt

White seniors from Roosevelt-Colonel White optional area attending Colonel White, 1963:

White	3**

* In 1963-64, 6 of 367 students who lived in the optional Colonel White/Roosevelt district and chose to attend Colonel White were black students. The following sources were used to gather this information: 1) The Colonel White High School directory for 1963-64; 2) Alphabetical list of streets in Colonel White High School district; and 3) Senior class composite pictures for 1964 through 1967. Each address in the directory was checked against the alphabetical list of streets to arrive at the number of students attending Colonel White and living in the optional area. Black students were identified from the composite. It was found that 6 lived in the optional area, 2 lived at Shawen Acres and 3 lived in the Colonel White only district.

Plaintiffs' Exhibit 15A

Racial composition of Roosevelt High School, 1963:

White	5.5%
Black	94.5%

COLONEL WHITE HIGH SCHOOL

Students from Roosevelt-Colonel White Optional Area Enrolled at Colonel White, 1963-64

Seniors	49
Juniors	87
Sophomores	95
Freshmen	136
Total:	367

From composite class photographs 6 of the black students at Colonel White in 1963 were from the optional area.

Source: Colonel White Student Directory, 1963-64.

Racial Composition of Colonel White High School, 1963-64, 98.9% white, 1.1% black. Racial Composition of Roosevelt High School, 1963-64, 94.5% black, 5.5% white.

** In the senior class picture of 1963, there are three white students who were attending from the optional area between Roosevelt and Colonel White: Donna Creager, 605 Ferguson Avenue; Larry Glascow, 1810 W. Riverview; and Jerry Porter, 104 Salem Avenue. The number of whites in the senior class of succeeding years is: 1964 . . . 9; 1965 . . . 2; 1966 . . . 3; and 1967 . . . 0.

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PLAINTIFFS' EXHIBIT 15A1

OPTIONAL AREA ROOSEVELT-COLONEL WHITE
STUDENTS ATTENDING COLONEL WHITE

Year	Students Living in Optional Area	Blacks	Whites
1957-58	Information impossible to obtain under time		
1958-59	limitations; no student directories available.		

The following information obtained from student directories and teachers.

1959-60	188	2	186
1960-61	286	2	284
1961-62	306	2	304
1963-64	366	6	360
1968-69	407	216	191
1969-70	354	245	109
1970-71	373	298	75

ROG:mh

159-Ex.

PLAINTIFFS' EXHIBIT 15B1

DESTINATION OF HAWTHORNE EIGHTH GRADERS
RESIDING IN COLONEL WHITE – KISER OPTIONAL AREA

	To Col. White	To Kiser	To Other
1962-63	15	6	
1963-64	21	2	
1964-65	22	18	
1965-66	not determined	not determined	
1966-67	not determined	not determined	
1967-68	14	27	0
1968-69	7	16	4 (Patterson)
1969-70	1	24	5 (Patterson)
1970-71	5	15	2 (Patterson)
1971-72	0	20	4 (Patterson)

All students are white

SOURCE: Hawthorne School, High School Destination Record Book

PLAINTIFFS' EXHIBIT 15C

OPTIONAL AREA (4040-4471 Little Richmond Road)
Fairview-Roth

Students Attending Fairview

Year	Blacks	Whites	Total
1965-66	0	0	0
1966-67	0	0	0
1967-68	0	0	0
1968-69	0	0	0
1969-70	0	0	0
1970-71	0	0	0
1971-72	0	2	2
1972-73	0	1	1

Source: Norm Feuer, Principal

Students Attending Roth

1965-66	0	0	0
1966-67	0	0	0
1967-68	0	0	0
1968-69	0	0	0
1969-70	0	0	0
1970-71	0	0	0
1971-72	0	0	0
1972-73	0	0	0

Source: William Scott, Principal

PLAINTIFF'S EXHIBIT 16B

GUIDELINES FOR FREEDOM OF ENROLLMENT DAYTON PUBLIC SCHOOLS

The Freedom of Enrollment Program is available to any student residing within the Dayton Public School District. This Enrollment Policy became effective September 1969. The provisions of Freedom of Enrollment are:

No student will be moved from the regular school unless the student and parent request a transfer.

Transfer requests will be honored only if the requested school has available classroom space.

Students who cannot obtain a required course in the school of attendance will be given priority for transferring to a school where that course is offered.

Transfers other than for special courses, must improve the racial balance in the receiving school.

Any two students or numerically equal groups can exchange places if the exchange improves the racial balance in the receiving schools.

Transfer to another school within the city may be made at the beginning of a semester. The student agrees to attend the receiving school for the entire school year, provide his own transportation, and adhere to standards and regulations of the receiving school.

I. PROCEDURES PRIOR TO SUBMITTING APPLICATIONS TO THE DEPARTMENT OF PUPIL PERSONNEL

An application for transfer may be obtained from and submitted to the principal of the home school district.

All requests for transfer shall be forwarded by the principal to the Department of Pupil Personnel for action.

The principal or a designated person should explain the provisions of Freedom of Enrollment to students or parents (as stated above).

All applications are dated when received by Pupil Personnel to establish priority when classrooms are closed due to increased enrollment.

Parents or guardians should be encouraged to sign application in the presence of a school official to verify approval of transfer.

The principal of the sending school must sign the application. The signature of the principal denotes the student is in good standing (attendance, conduct and achievement) and is being recommended for transfer.

If a student is requesting a specific subject which is *not* offered in his home school of attendance, a check should be made by the sending school to determine if desired subject is being offered.

PLAINTIFFS' EXHIBIT 16C

February 28, 1972

Mr. William Stover
Principal
Kiser High School
Dayton, Ohio

Dear Mr. Stover:

Thank you very much for your letter of February 22 concerning Freedom of Enrollment transferees to your school at the beginning of the second semester.

I like your suggestion concerning the possibility of an orientation program for Freedom of Enrollment students going into a new school. Through a copy of this letter to Mr. Carroll, I

will ask that he investigate such a procedure so that a smoother transition may be made by some of the students in the future.

As you are aware, the assignment of students under Freedom of Enrollment is based upon either the criterion of a special course not offered in the home school, or improvement of the racial balance in the receiving school. Additionally, however, it is necessary for the principal of the home school to certify that the student in question is in good standing. It seems to me that this is a professional responsibility placed upon the school principal and that it should not be necessary for central office personnel to review the record of every applicant. Consequently, I think that perhaps high school principals should discuss among themselves just what criteria should be used to define "good standing" and adopt guidelines that Mr. Carroll's office could follow. I should be most happy to discuss this matter further with you or with the principals themselves.

As to the matter of athletic eligibility, I think the sad fact is that we have learned from this experience. I cannot go along with the idea of declaring a student ineligible for one year from the date of his transfer since the Freedom of Enrollment policy itself is designed to encourage transfer. However, I do feel that a student participating in inter-scholastic activities in basketball, wrestling and gymnastics who transfers at mid-year should lose his eligibility in that sport for the remainder of that year. I have communicated my feeling about this to Mr. Marquardt and hope that I may be invited to the next Athletic Board of Control meeting when this particular problem is discussed.

Thanks for your letter. I certainly appreciate your ideas and comments.

Sincerely,
William H. Goff

WHG:jac
cc: Mr. Herbert Carroll
Mr. David Carter
Mr. William Marquardt

PLAINTIFFS' UNMARKED EXHIBIT

[LETTERHEAD OF THE DAYTON PUBLIC SCHOOLS]

May 18, 1970

Dear Parents:

As you know, last September individual transfers were authorized from Roth High School to several other high schools in the Dayton district as a result of physical assault and intimidation in the Roth area. Since that time, the situation has improved substantially to the point that the physical safety of students is reasonably secure.

This letter is to advise you that it will now be necessary for your son or daughter to attend Roth High School for the 1970-71 school year. At the end of school in June, transfers will be issued and records forwarded to Roth from the school which the student now attends.

If you have any questions about this move, please feel free to contact me at the Board of Education, 461-3850.

Sincerely yours,

/s/ WILLIAM H. GOFF

WHG/cf

Emergency Transfers from Roth

NAME	GRADE	SCHOOL ASSIGNED
Brickles, John	9	Meadowdale High
Combs, Gary	9 Spec.	Stivers High
Crowley, Loye	9	Stivers High
Davis, Marvin	10	Stivers High
Day, Stephen	9	Meadowdale High
Dennison, Catherine	9	Stivers High

Plaintiffs' Unmarked Exhibit

Dennison, Steven	9	Stivers High
Howard, Billy	12	Fairview High
Howard, David	9	Fairview High
Howard, Larry	10	Fairview High
Howard, Nadine	10	Fairview High
Humphrey, Raymond	9	Meadowdale High
Jones, Linda	9	Meadowdale High
McPherson, Gerald	10	Meadowdale High
Metcalf, Steven	9	Stivers High
Noe, Dwight	10	Belmont High
Ongell, James	11	Stivers High
Pelfrey, Brenda	12	Stivers High
Rader, Larry	10	Meadowdale High
Rogers, Darlene	9	Kiser High
Spencer, Amos	11	Meadowdale High
Smith, Bernie	9	Meadowdale High
Warner, Susan	11	Kiser
Wilson, Charles	9	Meadowdale High
Wilson, Deloris	11	Fairview High
Jones, Archie	11	Meadowdale High
Fielder, Robert	10	Stivers High
Fielder, Beverly	9	Stivers High
Maiden, Jerry	8	Drexel
Maiden, Robert	9	Stivers High
Hutchinson, Larry	9 Spec.	Meadowdale High
Philbeck, Paul	11	Meadowdale High
Partridge, James	8	Gardendale
Plemons, Billy M.	9	Meadowdale High
Joiner, Joy Sue	9	Kiser High
Ziegler, Darlene Sue	9	Kiser High

166-Ex.

Plaintiffs' Unmarked Exhibit

October 3, 1960

Mr. Arne Holmbo
Principal, Roosevelt High School
Dayton, Ohio

Dear Mr. Holmbo:

A limited number of Negro children from Prince Edward County, Virginia, have been brought to Dayton and placed in foster homes in order that their education may be continued. We have agreed to accept approximately ten of these students in the Dayton schools for the coming year tuition free. Three of these students are now enrolled in Roosevelt High School and their names are at the bottom of this letter.

I am enclosing a copy of a letter from the American Friends Service Committee giving additional information relative to this project. Possibly other members of your administrative staff should have an opportunity to read this letter.

Very truly yours,

B. H. Armstrong
Director of Pupil Personnel

BHA:tr
2 Enclosures

Walter Barksdale, 2033 Howell Avenue, Dayton 7, Ohio.
Charlie Bolden, 3610 Lakeside Drive, Dayton 8, Ohio.
Willie Bolden, 925 Eleanor Avenue, Dayton 8, Ohio.

167-Ex.

Plaintiffs' Unmarked Exhibit

October 4, 1960

Mr. Robert P. Smart
Principal, Nettie Lee Roth High School
Dayton, Ohio

Dear Mr. Smart:

A limited number of Negro children from Prince Edward County, Virginia, have been brought to Dayton and placed in foster homes in order that their education may be continued. We have agreed to accept approximately ten of these students in the Dayton schools for the coming year tuition free. Two of these students are now enrolled in Roth High School and their names are at the bottom of this letter.

I am enclosing the copy of a letter from the American Friends Service Committee giving additional information relative to this project. Possibly other members of your administrative staff should have an opportunity to read this letter.

Very truly yours,

B. H. Armstrong
Director of Pupil Personnel

BHA:tr
Enclosure

Anna Barksdale, 805 Walton Avenue, Dayton 17, Ohio
Mattie Paige, 4180 Sylvan Drive, Dayton 17, Ohio

168-Ex.

Plaintiffs' Unmarked Exhibit

August 19, 1970

Mr. Chester Gooding, Principal
Stivers High School
Dayton, Ohio

Dear Mr. Gooding:

Your concern about four students formerly from the Dunbar area has been duly noted and their records have been reviewed. It would appear that four students, Darlene Arnold, David Arnold, Darlene Claybourne, and Michael Jamison should not be returned to Stivers High School on the basis of poor attendance and behavior and failure in classroom work.

I shall ask Mr. Hart, Visiting Teacher, to process the two boys for assignment to the Continuing Education Program. Placement of Darlene Claybourne and Darlene Arnold will have to await a parent conference.

Sincerely yours,

William H. Goff

WHG/cf

cc – Mr. George Findley, Principal, Dunbar High School
Mr. Denis Hart, Visiting Teacher

169-Ex.

Plaintiffs' Unmarked Exhibit

Emergency Transfers from Stivers

NAME	GRADE	SCHOOL ASSIGNED
Tomlin, Lionel	11	Dunbar High
Mann, Steve	9	Dunbar High
Thomas, Patricia	9	Dunbar High
Casey, Guy	9	Dunbar High
Tucker, Harold	9	Dunbar High
Cooper, Darlene	9	Dunbar High
Cooper, David	9	Dunbar High
Hill, Peter	9	Dunbar High
Mattison, Randall	9	Dunbar High
Robinson, Raymond	9	Dunbar High
Miller, Lee	9	Dunbar High
Jamison, Michael	9	Dunbar High
Kimbrough, Helen	9	Dunbar High
Bryant, Donald	9 spec.	Dunbar High
Perdue, Diane	9	Dunbar High
Boyd, Donald	9	Dunbar High
Anderson, Debra	9	Dunbar High
Jones, Rudolph V.	9	Dunbar High
Claybourne, Cassandra	12	Dunbar High
Claybourne, Gary	10	Dunbar High
Claybourne, Darlene	9	Dunbar High
Porter, Richard	9	Dunbar High
Austin, Ronald	9	Dunbar High
Knox, Curtis	11	Dunbar High
Knox, Wayne	9	Dunbar High
Roberts, Delores	9	Dunbar High
Bush, Charles	9	Dunbar High
Bush, Theresa	9	Dunbar High
Mock, Edward	9 spec.	Dunbar High
Sanders, Diane	9	Dunbar High
Turner, Lenore	9	Dunbar High
Broyles, Junette	9	Roosevelt High
Mack, James	9	Roosevelt High
Mack, Tyrone	9	Roosevelt High

170-Ex.

Plaintiffs' Unmarked Exhibit

March 5, 1956

Mr. Walter E. Stebbins
Superintendent, Mad River Township Schools
Mad River Elementary School
1830 Harshman Road
Dayton 4, Ohio

Dear Mr. Stebbins:

In our recent phone conversation, I believe you advised me that you had approximately one hundred forty-two (142) 8th grade pupils to be served in the Dayton Public Schools in the 9th grade this fall at Stivers or Wilbur Wright. Sixty-two (62) of these pupils are now in your Page Manor School and eighty (80) are in Harshman and Overlook. We suggest that these pupils be divided between Stivers and Wilbur Wright according to the policy used in September, 1955. This would mean the sixty-two (62) Page Manor pupils would attend Stivers and the eighty (80) Harshman and Overlook pupils would attend Wilbur Wright.

It is our understanding that these pupils will attend high school in Dayton only next year, and that they will return to your new Mad River High School in September, 1957.

Very truly yours,

B. H. Armstrong
Director of Pupil Personnel

BHA:tr

cc: Mr. Holmes, Wilbur Wright High School
Mr. Carpenter, Stivers High School
Mr. Royer

171-Ex.

Plaintiffs' Unmarked Exhibit

March 5, 1956

RE: William Aldrich

Mr. F. F. Carpenter
Principal, Stivers High School
Dayton, Ohio

Dear Mr. Carpenter:

The above-named pupil is a tuition case and prior to entering Stivers he attended Belmont Elementary School as a tuition pupil since the beginning of the 5th grade. He will continue next fall as a tuition pupil in the Dayton schools and may, therefore, attend the new Belmont High School.

Very truly yours,

B. H. Armstrong
Director of Pupil Personnel

BHA:tr

172-Ex.

Plaintiffs' Unmarked Exhibit

August 29, 1962

Mr. Lloyd G. Phillips
Principal Dunbar High School
Dayton, Ohio

Dear Mr. Phillips:

Pupils living in the country or rural area in the southern part of Highview district are provided transportation to elementary and high school. Last year there were only approximately six high school students living in this area to be transported to Roosevelt and in order to avoid the use of one high school bus for only six pupils, Roosevelt High School rearranged the schedules of these six pupils giving them a Study Hall the first period. This made it possible for the one elementary bus running in this Highview area to pick up both elementary and high school pupils; drop the elementary pupils off at Highview and take the high school pupils on to Roosevelt arriving at Roosevelt sometime during the first period. There was no problem in the afternoon of course since the high school is out earlier than elementary. The one bus would first pick up the high school students at Roosevelt at 3:00 o'clock and go by Highview and pick up the elementary.

Now that the Highview district is in Dunbar, we would like to continue this same plan providing there are not too many high school pupils and of course assuming that their schedules can be arranged as last year. I do not have the names of the high school pupils in this area who will be entering Dunbar this fall. Possibly Mrs. Sharp may know or soon after school opens we will learn who they are.

Very truly yours,

B. H. Armstrong
Director of Pupil Personnel

BHA:ev
cc – Mrs. Sharp, Highview Elementary School

173-Ex.

PLAINTIFFS' EXHIBIT 16D

1972-73 TRANSFERS BETWEEN SCHOOLS

1] Freedom of Enrollment

Approvals
Whites
23 Approved
22 to white schools
1 from parochial school to school 54.6% black

Blacks
460 Approved
1 to black school
459 to white schools

2] Disciplinary Transfers

Blacks	
Black to black	6
Black to white	2
Whites	
White to white	3
Mixed to white	

Source: D.P.S. Unit Directors and Student Relations Department

PLAINTIFFS' EXHIBIT 16F

1972-73 OTHER TRANSFERS BETWEEN SCHOOLS

3] Hardship and Emergency Transfers

260 Blacks

Black to black	157
White to black	3
Black to white	73
White to white	12
Mixed to white	5
Mixed to black	8
Black to mixed	2

104 Whites

White to white	71
Black to white	6
Mixed to white	17
Mixed to black	0
White to mixed	8
White to black	2

4] Special Education Transfers

117 Blacks

Black to black	91
White to black	7
Black to white	4
White to white	15
Mixed to white	–
Mixed to black	–
Black to mixed	–

67 Whites

White to white	61
Black to white	–
Mixed to white	–
Mixed to black	5
White to mixed	1
White to black	–

Source: D.P.S. Unit Directors

PLAINTIFFS' EXHIBIT 19

INTEGRATION – DAYTON PUBLIC SCHOOLS

August 1, 1963

Twelve years ago the Dayton Public Schools started a slow and gradual integration of the faculties of the Dayton schools, both elementary and high schools. Although complete integration is far from achieved, significant progress has been made. The program of teacher integration has progressed with a minimum of controversy. Negro teachers assigned to schools located in white areas have been most cordially received. Many competent Negro teachers hesitate to accept assignments in white neighborhoods. The assignment of strong white teachers to schools in Negro communities is more difficult, not because such teachers are intolerant or prejudiced, but because they feel that they have never had experience in such situations and might feel "out of place." The white teachers who have accepted these assignments find the experience stimulating and interesting and seldom ask for transfers. Regardless of difficulties, substantial progress has been made.

To assign Negro teachers to white neighborhoods or white teachers to Negro communities against their wishes would be impractical. The supply of competent teachers is such that they may find employment in other school systems.

With regard to the integration of pupils in the Dayton schools, during the past decade nothing has ever been done to deliberately segregate pupils. On the other hand, an attempt was made several years ago to promote integration of pupils by building new schools and additions on the fringe of Negro areas so that such schools could serve both races. Soon after construction of these buildings the composition of the entire area became predominately Negro and the area became as nearly segregated as before. Recently the old Dunbar High School which was for all practical purposes a Negro high school serving the entire city was replaced by

the new Dunbar High School with definite boundaries. Although the Negro population is concentrated on the west side, it is true that there are some white pupils attending every school in the city with the exception of Wogaman School and some Negro pupils attending 45 of the 66 schools of the city. The Dayton Night School, attended by adults, is completely integrated.

School Boundaries

The entire Dayton City School District is divided into high school and elementary school districts and boundary lines are established and strictly enforced. In other words, pupils must attend the school that serves the area in which they live. The following criteria determine the establishment of school boundaries:

1. Capacity of the school building
2. Present number of pupils to be served and anticipated growth or decline of the pupil population area
3. Accessibility and distance – avoiding extreme hazards if possible

Due to difference in building capacity and number of pupils within the vicinity to be served, it is not always possible to set up boundaries so that pupils may attend the closest school. The additional distance some pupils must travel is never very great.

From time to time it becomes necessary to change boundaries in order to avoid over-crowding some buildings.

No other consideration than those enumerated above have entered into the establishment of boundary lines.

Employment Practices

Teaching Positions

The personnel department of the Daytion schools is charged with the responsibility to recommend for teaching positions the

most competent people they can discover by visitation of colleges and universities and from applications. No consideration is given to such factors as marriage, residence, race, or religion. The employment officials have been almost completely free from pressures of any kind to recommend employment except on the basis of merit.

It should be kept in mind that in these days of teacher shortage, the personnel department does not always have as wide a choice of applicants as they would like, but with this limitation, the department has over the years succeeded remarkably well in staffing the schools with teachers who are considerably above average in ability.

Because it is widely known that Dayton employs Negro teachers and because teachers' salaries are higher than in the southern states, the personnel department has a large number of Negro applicants. Some of these applicants have been in the files for several years and it is only natural for such applicants to conclude that some factor other than merit is preventing their employment. The same is true of a number of white teachers but to a lesser extent.

Procedures are as follows:

1. Any person who can qualify for a four year provisional, eight year professional or permanent Ohio certificate may apply
2. Any applicant may secure an interview
3. The following credentials are considered:
   a. College transcript and graduate record
   b. Recommendations of college professors
   c. Character references
   d. Evaluation of student teaching
   e. Evaluation of principals' statements, if substitute teaching has been involved
   f. Recommendations on previous teaching experience
   g. Recommendations on previous work experiences
   h. Evaluation of group leadership experiences such as

   scout leadership, camp direction, 4H Club sponsorship, playground supervision, etc.
   i. Summary evaluation of interview records

After all factors are considered, the most important factor is the teaching personality. This must eventually be a matter of subjective judgment of the employing officer. Final appointments are recommended by the Superintendent of Schools to the Board of Education.

Employment of Non-Certified Employees — Custodians, Clerks, Cafeteria Employes

The same point of view governing the employment of teachers applies to all other categories of employees. Attention is focused on merit and nothing else. Race, religion or other extraneous considerations are not a condition of employment.

Student Teachers

The Dayton schools cooperate with a number of teacher-training institutions by providing opportunity for teachers in training to fulfill the requirement for practice teaching. The arrangement is beneficial both to the trainee and the Dayton schools. Such teachers are assigned to schools without reference to race.

Substitute Teachers

It is not difficult for a teacher to be placed on the substitute list, providing he meets the legal certification requirements. The amount of work that a substitute teacher receives depends upon the absence of regular reachers and the ratings the substitute receives from principals. If a number of ratings are poor, the substitute is dropped from the list. Substitutes are sent to all schools without regard to race. Principals, at times, ask for specific substitutes and these requests are given consideration. During the school year 1962-63, both white and Negro substitutes were sent to every school in the city.

Plaintiffs' Exhibit 19

Numbers of Negro and White Teachers and Pupils

The school system keeps no statistics on the numbers of white and Negro pupils and teachers. The figures here given are based upon a questionnaire sent to school principals in July, 1963. The are estimates.

		White	Negro	Per Cent Negro
Total Enrollment–June, 1963	56,608	42,230	14,378	25.4
High School Enrollment	13,433	9,842	3,591	26.7
Elementary Enrollment	43,175	32,388	10,787	34.9
Total Employees – All Categories	2,908	2,555	653	22.5
Teaching and Professional Personnel	2,353	1,875	478	20.3
Operational Employees – Building	307	159	148	48.2
Clerical	123	114	9	7.3
Crafts – Plumbers, Carpenters, Bricklayers, Painters, etc.	39	39	0	0
Food Service	86	68	18	20.1

Negro teachers are members of the faculties of all Dayton high schools and the Dayton Night School. Negro teachers are members of the faculties of 57 of the 66 schools of the city. Although there are some Negro pupils attending 45 of the 66 schools, the great majority of Negro pupils attend the schools which serve the so called west side which is heavily populated by Negroes. The enrollment of such schools as MacFarlane, Wogaman, Carlson, Miami Chapel, Louise Troy, Jackson Elementary, Jackson Primary, Whittier, Weaver, Irving, Westwood, Grace Greene, Roosevelt and Dunbar is predominately Negro. In these schools the number of white and Negro teachers is as follows:

Plaintiffs' Exhibit 19

	Negro Teachers	White Teachers
MacFarlane	48	2
Wogaman	40	1
Carlson	12	4
Miami Chapel	33	5
Louise Troy	22	1
Jackson Elem.	25	12
Jackson Pri.	12	7
Whittier	17	20
Weaver	34	14
Irving	19	19
Westwood	22	46
Grace Greene	12	18
Roosevelt	22	60
Dunbar	44	6

Buildings, Equipment, Supplies

The location of all new buildings and additions has been based upon surveys of pupil population and availability of suitable sites. No other factor has ever been considered. Standards governing the quality and facilities of new school construction have been uniform throughout the city. Standards regarding equipment, supplies, class size and instruction have also been uniformly applied.

PLAINTIFFS' EXHIBIT 21

Policy Regarding Integration

The Board of Education is opposed to racial segregation in the Dayton Public Schools. It is the policy of the Board of Education to continue and enlarge gradually the program of integration of the educational staff with the objective of having on the educational staff approximately the same proportion of negro teachers as there are negro pupils in the Dayton schools.

The school administration will make every effort to introduce some white teachers in schools in negro areas that are now staffed by negroes, but it will not attempt to force white teachers, against their will, into these positions.

The administration will continue to introduce negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers.

The Board of Education does not consider a school to be segregated when the school district, which the school serves, contains children of only one race. Because attendance at Dunbar High School, in the 9, 10, 11, and 12 grades, is voluntary, the Board of Education does not consider Dunbar High School to be a segregated school.

ROBERT B. FRENCH,
Superintendent of Schools

PLAINTIFFS' EXHIBIT 28

SOME FACTS AND FIGURES REGARDING INTEGRATION FOR BOARD OF EDUCATION DISCUSSION AT LUNCHEON MEETING

December 2, 1954

All elementary schools have definite boundaries and children are obliged to attend the school which serves the area in which they reside. The policy of transfers from one school to another was abolished two years ago when the boundaries of several westside elementary schools were shrunken, permitting a larger number of Negro children to attend mixed schools. The policy of no transfers was not retroactive. (i. e. If a child had permission to attend a mixed school before the ruling became effective, he can continue to attend this school for his elementary education.)

Dunbar High School has no boundary lines. Theoretically, any child in the city can elect Dunbar, but, practically, only Negro children attend. The staff is completely negro, except for Driver Training teachers. Children who attend the high school grades at Dunbar do so by choice. A Negro child can always attend the high school which serves his area.

The schools keep no records of racial identification, but the school census taken last May, 1954, enumerated 8,295 negro children between the ages of 5 and 17, which is 15.7% of the total number of children enumerated between the ages of 5 and 17. The school enrollment of negro children would be less than 15.7%, due to the fact that a larger percentage of negro families than white families do not send their children to kindergarten and there is always a larger drop-out rate among older negro children.

At the present time we employ 168 negro teachers out of a total 1,577 teaching positions, which is 10.6%. In September, 1951, the first negro teacher was placed in a mixed school –

Plaintiffs' Exhibit 28

Weaver School. At the present time we have 17 negro teachers assigned to mixed or all-white schools. In addition, we have at the present time 8 white teachers working in all-negro schools – 3 on a full-time basis and 5 on a part-time basis. The following elementary schools having mixed or all white population have negro teachrs:

Edison (4)	Emerson (1)	Weaver (3)
Jackson (3)	McKinley (1)	Whittier (1)
Highview (1)	Washington (1)	Van Cleve (1)
	Webster (1)	

About two years ago we announced a policy of attempting to introduce white teachers in our schools having negro population. We have not been too successful in this regard and at the present time have only 8 full or part-time teachers in these situations. There is a reluctance on the part of white teachers to accept assignments in westside schools and up to the present time we have not attempted to use any pressure to force teachers to accept such assignments. The problem of introducting white teachers in negro schools is more difficult than the problem of introducing negro teachers into white situations. There are several all-white schools which in the near future will be ready to receive a negro teacher.

The policy of sending negro children from Shawen Acres to Garfield School was discontinued this September and these children now attend Van Cleve, Brown, Loos and Shiloh schools.

ROBERT B. FRENCH,
Superintendent of Schools

PLAINTIFFS' EXHIBIT 29

October 10, 1956

REPORT ON PROGRESS TOWARD STAFF INTEGRATION DAYTON PUBLIC SCHOOLS

The first Negro teacher pleaced in school and classroom with both Negro and white pupils was in September 1951. The teacher was Mrs. Willeta Weatherford, then Miss Willeta Chavous.

In September 1952 we had 7 teachers so placed, in 1953 there were 11. By 1954 we had 18 persons so employed, by 1955 there were 32, and this year there are 53 Negro teachers teaching in schools which are attended by pupils of both races or by all white pupils.

The schools and number of Negro teachers are as follows:

Brown	½
Central	1
Edison	4
Emerson	1
Greene	1
Grant	1
Highview	5
Irving	4
Jackson	7½
Van Cleve	1
Washington	2
Weaver	13
Whittier	5
Orville Wright	1
McKinley	1
Stivers	1
Roosevelt	2
Fairview	1
Wilbur Wright	1
Total	53

Plaintiffs' Exhibit 29

In addition 12 white teachers teach all or part time in schools attended only by Negro pupils as follows:

Dunbar	3	part time
Garfield	2	part time
Miami Chapel	3	full time
	4	part time
Wogaman	1	part time

32 new Negro teachers were employed this year.

In all 838 teachers are working in a school staff at present which has some degree of racial integration.

PLAINTIFFS' EXHIBIT 35

STAFF INTEGRATION
AUGUST 1964

POLICY:

Beginning in 1951, by policy of the Board of Education, we began staff integration in the Dayton Public Schools. From that first year when one Negro teacher taught an integrated group of students, the program has moved regularly and steadily, growing each year. It is the policy of the Dayton schools to continue this policy, not to increase it in response to pressures of minority groups, majority groups, or law enforcement agencies, but to continue our policy of employment on merit, because percentages have now reached a place where they should be ignored completely.

EMPLOYMENT:

Employment for 1964-65 is not complete, therefore any present figures cannot be final. To date 69 Negro teachers have been employed. This figure represents 27% of all employments and will bring the percentage of Negro professional employees from 20.3% at the start of last year, to approximately 21.4% for 1964-65 with a total of 511. In some cases this figure represents progress. In other cases it does not. In more cases than in other recent years excellent white candidates have refusd positions in the city because of fear of placement in predominantly Negro schools. This is not always because of personal prejudices, but because of tensions and rioting in other cities which they fear will spread to our city. It is also because of the great number of teaching openings in the suburbs. Integration of staffs cannot long continue in our larger cities unless greater effort is made to integrate staffs in our suburbs. In some cases this year we feel we have been compelled to accept less desirable and less

qualified candidates than could have been employed under other conditions:

ASSIGNMENT:

It is now possible to assign Negro teachers to any school. We have never transferred white teachers away from a school to make staff integration possible, but have added Negro teachers as openings occurred. It appears now that unless late openings occur, we will have 14 elementary schools with no full-time Negro teachers on their staffs. However, several of these 14 schools will have Negro traveling teachers; Art, Music, Physical Education, Home Economics, or Industrial Arts teachers. Often traveling teachers are the best possible integrationists. A regular classroom teacher contacts only 30 students, but a music or art teacher assigned only three days to a building each week contacts hundreds of children. A complete report in this area cannot be available until late September.

PROMOTION:

Of the 141 persons taking the promotional examination since the start of this examination given by N.T.E. of Princeton, N.J. each March, 17 Negro teachers have taken the tests. Nine have passed the test with scores above the cut-off score. Of the nine, six have already been promoted and only three eligible candidates remain. At this point we could be justly accused of discriminating against white candidates for promotion, if promotions were based solely on test scores, which they are not.

Since the report of 1963 we have appointed a Negro principal, an assistant principal, and a teacher consultant on the administrative staff. Of seven administrative and promotional positions, three have been filled by Negro candidates.

SCHOOLS PREDOMINANTLY WHITE — No Negro Students/Teachers	SCHOOLS PREDOMINANTLY NEGRO — No White Students/Teachers
Allen Belmont Elementary Brown Cleveland Fairport Fr. McKinley Hawthorne Hickorydale Lewton Loos Horace Mann Shiloh	All have traveling teachers in instrumental music, vocal music, art, physical education, industrial arts, home economics.

Of 67 schools 12 which are predominantly white, have no Negro teachers. All predominantly Negro or all Negro schools have some white staff personnel.

New Employments 1964-65: 73 Negro of 267 or 27.3%.

Training:

The 14 elementary schools which are predominantly Negro in student body were studied as to training and qualification of teachers. Results were indicated as follows:

Training.

PhD	M.A. or M.E.	A.B. or B. Sc.	Less than Degree	Temporary
1	76	343	26	0
Percentage in each category:				
.004	.17	.82	.055	
Average percentage of all elementary teachers:			.07+	

PLAINTIFFS' EXHIBIT 39

NUMBER OF TEACHERS BY RACE AND % OF NEGRO TEACHERS

School	1967-68 White	1967-68 Negro	1967-68 % Negro	1968-69 White	1968-69 Negro	1968-69 % Negro
Jane Addams	21	4	16.0%	20	6	23.1%
Allen	23	1	4.2	24	1	4.0
Belle Haven	39	1	2.5	43	2	4.4
Belmont Elem.	26	0	0.0	26	1	3.7
E. J. Brown	39	0	0.0	44	1	2.2
Carlson	0	16	100.0	4	21	84.0
Cleveland	41	0	0.0	44	1	2.2
Cornell Heights	27	2	6.9	31	3	8.8
Drexel	22.5	2	8.2	24	2	7.7
Eastmont	33	1	3.0	36	1	2.7
Edison	10	22	68.8	2	16	88.9
Emerson	31	3	8.8	39	4	9.3
Fairport	26	1	3.7	32	2	5.9
Fairview Elem.	26	1	3.7	32	2	5.9
Fort McKinley	15	1	6.7	17	1	5.6
Frankin	31	0	0.0	36	1	2.7
Gardendale	8	4	33.3	8	3	27.3
Gettysburg	21	1	4.5	25	1	3.9
Grant	29	1	3.3	30	2	6.3
Greene	7	18	72.0	5	21	80.8
Hawthorne	11	0	0.0	12	0	0.0
Hickorydale	17	0	0.0	22	0	0.0
Highview	9	21	70.0	15	21	58.3
Huffman	33	4	10.8	38	3	7.3
Irving	10	21.5	68.3	9	26	74.3
Jackson Primary	4	24	85.7	4	19	82.6
Jackson Elem.	5	33	86.8	6	33	84.6
Jefferson Primary	19	3	13.6	14	9	39.1

Plaintiffs' Exhibit 39

School	1967-68 White	1967-68 Negro	1967-68 % Negro	1968-69 White	1968-69 Negro	1968-69 % Negro
Jefferson Elem.	36	4	10.0	36	8	18.2
Kemp	24	0	0.0	28	0	0.0
Lewton	21	0	0.0	22	0	0.0
Lincoln	38	1	2.6	42	1	2.3
Longfellow	31	4	11.4	33	7	17.5
Loos	24	1	4.0	28	1	3.5
MacFarlane	1	47	97.9	1	48	98.0
Horace Mann	12	0	0.0	14	0	0.0
McGuffey	32	1	3.0	35	1	2.8
McNary	1	17	94.4	3	19	86.4
Meadowdale Elem.	24	1	4.0	30	1	3.2
Louise Troy	0	22	100.0	0	20	100.0
Miami Chapel	3	27	90.0	4	29	87.9
Patterson Elem.	24	1	4.0	25	1	3.9
Residence Park Primary	6	10	62.5	5	11	68.8
Residence Park Elem.	11	19	63.3	11	23	67.7
Ruskin	34	0	0.0	38	1	2.6
Shiloh	18	0	0.0	19	0	0.0
Shoup Mill	11	0	0.0	14	1	6.7
Valerie Drive	13	0	0.0	18	1	5.3
Van Cleve	30	1	3.2	33	1	2.9
Washington	22	3	12.0	23	4	14.8
Weaver	4	41	91.1	4	43	89.6
Webster	23	1	4.2	28	0	0.0
Westwood	18	43	70.5	22	42	65.6
Whittier	14	17	54.8	12	21	63.6
Wogaman	0	35	100.0	1	40	97.6
Orville Wright	28	0	0.0	29	1	3.3
Gorman	8	0	0.0	14	0	0.0
Kennedy	17	4	19.0	17	6	26.1

192-Ex.

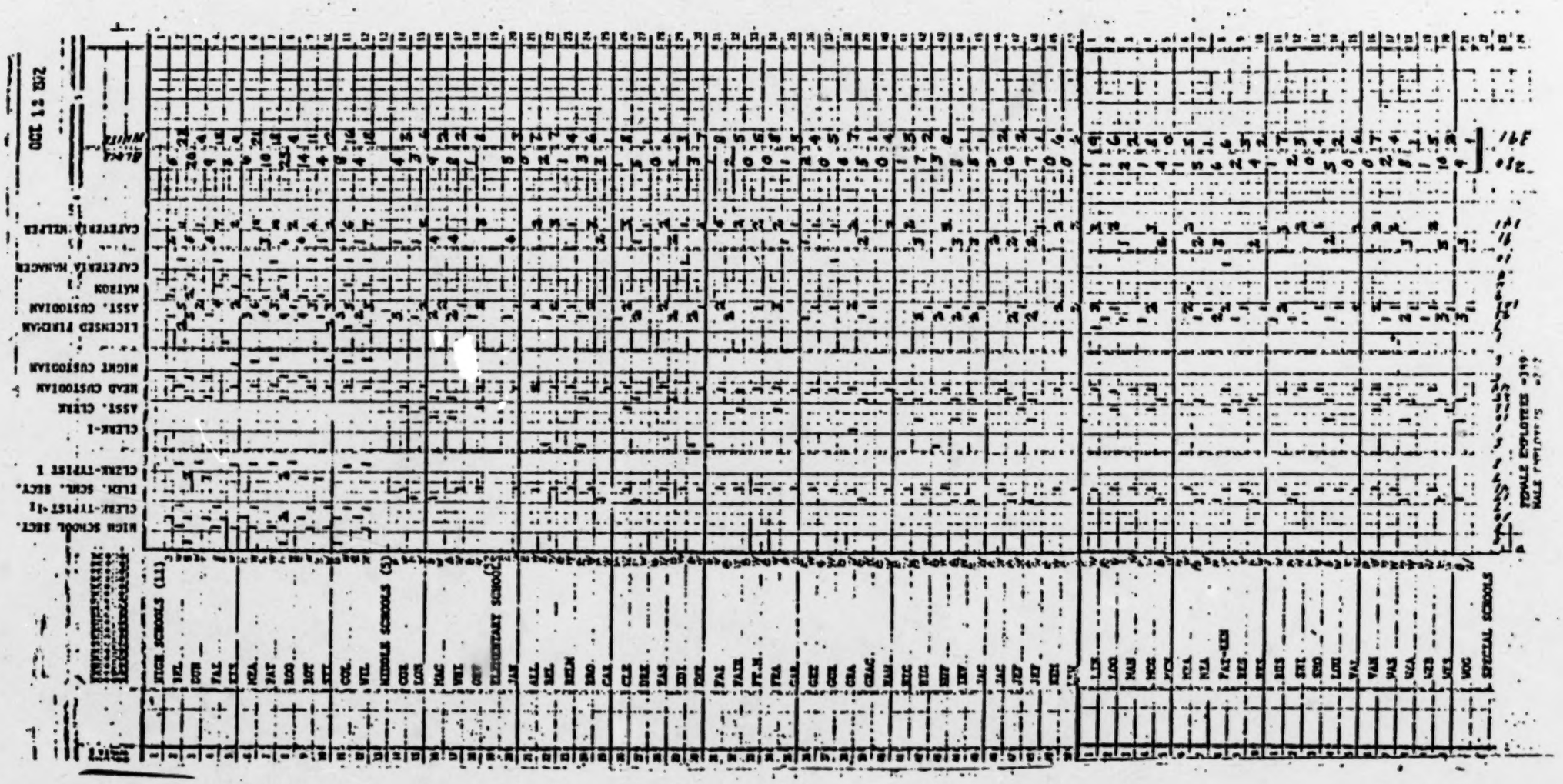
Plaintiffs' Exhibit 39

School	1967-68 White	Negro	% Negro	1968-69 White	Negro	% Negro
Belmont High	74	3	4.1	82	5	5.8
Dunbar	5	56	91.8	8	62	88.6
Fairview High	59.8	2	3.3	72	5	6.5
Kiser	36	1	2.7	44	2	4.4
Meadowdale High	64	4	5.9	75	4	5.1
Patterson Co-op	40	0	0.0	82	3	3.5
Roosevelt	44	51	53.7	36	68	65.4
Roth	23	35	60.3	19	50	72.5
Stivers	43	6	12.2	50	3	5.7
Col. White	73	1	1.4	80	5	5.9
Wilbur Wright	59	3	4.8	67	5	7.0

Full-time instruction staff:
1,807.8 White
695.2 Negro (27.8%)

Full-time instructional staff:
1,847.0 White
746.0 Negro (28.8%)

PLAINTIFFS' EXHIBIT 42



194-Ex

PLAINTIFFS' EXHIBIT 55

[LETTERHEAD OF STATE OF OHIO, DEPARTMENT OF EDUCATION, COLUMBUS, 43215]

March 20, 1972

Dr. Wayne M. Carle
Superintendent
Dayton City Schools
348 W. 1st Street
Dayton, Ohio 45402

Dear Dr. Carle:

We have received several calls which would appear to be products out of the rumor mill dealing with possible curtailment of specific staff in the Dayton City Schools. Rumor has it that the Dayton Board of Education is preparing a cutback of personnel working with School-Community Services.

As you know, this office has worked very closely with your staff in school-community relations over the past few years. We have tried to be helpful in securing additional funds to aid in such areas as staff development, community understanding and other matters pertaining to better human relations. The explosive nature of community emotions in Dayton requires the continuing efforts of your excellent school-community services staff.

The Department has had excellent support from the legislature in expanding funds to local districts under Disadvantaged Pupil Programs and Municipal Overburden. Priorities emphasized in our legislative hearings including funding to assist schools and their communities in human relations efforts. All of us realize that good education is best achieved in a climate of understanding. This has been the thrust of your school-community services department.

Plaintiffs' Exhibit 55

The privilege of local autonomy is recognized from our level, and I would be the last to attempt to interfere in local school goverance. However, there have been so many reversals of a negative nature coming out of your district recently until I am forced to take a good hard look at the priority posture toward the elimination of vital services.

I am requesting that you keep me informed as to any change in posture which might eliminate services under our special funding sources. Dayton, as all our districts, has on file a 441 agreement under Title VI of the Civil Rights Act. This agreement permits the application for and flow of federal and special state dollars to guarantee equal educational opportunity. I would not like to be forced into a position calling for a recommendation of withdrawal or withholding of funds.

Sincerely,

/s/ ROBERT O. GREER
Assistant Superintendent
Urban Education

ROG:mh

PLAINTIFFS' EXHIBIT 56

[LETTERHEAD OF TOUCHE ROSS & CO.]

July 11, 1972

Mr. James D. Hart, President
Dayton Board of Education
Dayton, Ohio

Dear Mr. Hart:

We have completed our independent review of the overall Business Operations of the Dayton School District. As a result of our detail analysis work, we have developed recommendations which are presented in the enclosed report. These recommendations provide a basis for direct action by the School District on major business management matters.

We would like to express our thanks to members of the Board, the Superintendent and the Administrative staff for their excellent cooperation throughout the project. Their cooperation enabled us to develop the recommendations in the enclosed report.

We have not attempted herein to summarize the accomplishments of the school system or the dedication of the personnel that was noted in our review. To do so would increase the size of this document beyond manageable proportions. Rather, we have concentrated only on those areas in which we believe action should be taken.

It is sincerely hoped that this study, together with other programs and activities by the Board and the Administration, will enable the School District to make additional progress toward its main objectives.

Respectfully submitted,

/s/ TOUCHE ROSS & CO.

Plaintiffs' Exhibit 56

DAYTON BOARD OF EDUCATION
BUSINESS OPERATIONS REVIEW REPORT

INTRODUCTION

Project Objective

On February 24, 1972, the Dayton Board of Education voted unanimously to engage Touche Ross & Co. to conduct an independent review of the overall business operations of the Dayton Public Schools directed toward achieving increased economies where possible and analyzing the allocation of resources. We were to make recommendations based upon the results of the review. The study thus involved a review of the organizational, operational, financial and managerial practices presently employed in the system. It did not include an evaluation of educational programs nor an evaluation of individual employees.

Project Approach

The study began in mid-March. During the initial phase of the project, we conducted interviews with personnel throughout the school organization, from Board members and the Superintendent to Department Supervisors and operational personnel. The purpose of these interviews was to give us an understanding of both the present and planned future organization structure and operational practices. We visited a selected sample of schools to assure proper understanding of school operations. Also we devoted a significant amount of time to collecting and analyzing data on staffing, work procedures, activity levels and productivity (where applicable) in each of the areas reviewed.

We used basically four criteria which we have found relevant in similar situations to assist us in the evaluative process:

1. Standards or guidelines established by the State Department of Education.

Plaintiffs' Exhibit 56

2. Standards or guidelines established within the Dayton School District.
3. Comparable operating statistics of other school systems.
4. Sound business practices substantiated by Touche Ross & Co. experience within similar operations in government and business.

The observations and recommendations we have developed have been reviewed and discussed in detail with the person or persons responsible and general implementation strategies have been discussd. In areas where it was not planned for us to make our all encompassing review, we have noted situations which warranted further analysis by the School District.

The analysis inherent in our study was not and should not be considered an audit of the operations of the School District. The conclusions should not be considered as an expression of an audit opinion under generally accepted auditing standards.

SUMMARY OF RECOMMENDATIONS

In this section of the report we have summarized our recommendations which represent approximately two millior dollars in potential annual savings plus a one-time savings of two to three million dollars for the Dayton Board of Education. Dollar savings were estimated at 1972 expenditure level. In addition, several recommendations have been made which do not necessarily result in cost savings but should increase the effectiveness of the operations of the School District. Supporting information is provided in the Detail Section of this report.

A. School Facilities

— Appoint a Study Committee to select schools to be

phased out and plan the implementation of student reassignment. The committee's minimum objective should be to increase the overall elementary and middle school classroom utilization to 85% by phasing out nine *average size* schools or the equivalent thereof.

Estimated Annual Dollar Savings – $745,000 to $895,000

Estimated One-Time Dollar Savings – $2,000,000 to $3,000,000

B. Teacher Staffing

– Adopt the practice of using projected average daily membership (ADM) as the basis for teacher staffing rather than projected enrollment.

Estimated Annual Dollar Savings – $350,000

• • •

– Review staffing levels in schools that have low efficiency in meals per hour of serving labor with the objective of raising the productivity to the median value presently achieved by comparable school lunch programs in other Dayton Schools.

Estimated Dollar Savings – $20,400

– Improve the inventory control, cost reporting and management information for the food service operation as described in the detail report.

G. Purchasing

– Modify the present computer system for inventory reporting to use more sophisticated inventory con-

trol techniques and to provide exception reporting. High cost items should be implemented first on the new system.

– Revise the warehouse storage space assignments to assure efficient stock picking procedures.
Estimated Annual Dollar Savings – $10,000

H. Additional Observations

– Review student transportation policy as compared to state requirements and either revise policy or eliminate outside contract through purchase and operation of Board owned buses, saving money in either case. The effect of the freedom of enrollment policy was not included in this analysis because it is too early to predict the effect at this time.

Estimated Annual Dollar Savings – $50,000

– Renegotiate the current maintenance contract (with regard to specialization by craft and wage rate as a percent of effective average rate of construction craftsmen in the Dayton, Ohio area) or seriously consider the feasibility of a maintenance contract with an outside firm.

– Continue as a member of the Metropolitan Dayton Educational Cooperative Association (MDECA).

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A. SCHOOL FACILITIES

BACKGROUND

Over the past several years there has been much discussion regarding the feasibility of closing several elementary schools. Primarily the context of the discussions has been in regard to the adequacy of the facilities and the wisdom of committing

capital expenditures to improve the facilities. Various studies regarding school facilities have been made, such as: Educational Facilities Evaluation prepared by the Educational Administration and Facilities Unit of the College of Education of Ohio State University; Report of the Committee of 75 (Buildings and Facilities – Subcommittee IX); the analyses of Continued Operation of Selected Elementary School Facilities by Mr. Robert Weinman, Executive Director of Management Services Department, Dayton City Schools and others.

Current Situation

We have attempted in our study to identify, quantify and more clearly state what we believe to be one of the major problems which faces management of the Dayton School District. The basic problem is not simply inadequate facilities but, in addition, is under-utilization of existing facilities. When the two problems are considered jointly there is an opportunity to solve, to a significant degree, both problems with a mutual solution which is eliminating excess capacity by phasing out those facilities which are inadequate and would require major capital expenditures to renovate.

This percentage is actually overstated since schools are essentially closed for three months or an additional one-fourth of a year. In light of the fact that the enrollment projections call for a reduction of approximately 5,495 students in elementary and middle schools by the school year 1975-76, the utilization rate will drop to seventy percent (70%), if existing facilities are not phased out. Under-utilization of facilities is definitely important because the School District has an investment in the buildings which could be at least partially recovered through other uses of the buildings and property. Also, the District is incurring annual operating costs which could be spent in other areas of need, if the buildings which are not required were phased out.

The annual operating cost on a system-wide basis for elementary and middle schools that could be saved is approxi-

mately $140.00 per unit of student capacity (see Exhibit A-2). The *average size* elementary and middle school on a system-wide basis has a student capacity of 746 students. Thus, if one *average size* elementary school were closed to eliminate excess classroom capacity, the School District would realize an annual savings of approximately *$105,000*. By 1975-76 school year, the excess capacity will be 12,872 student units. Thus, in order to achieve 85% utilization by the 1975-76 school year, nine (9) *average size* schools of 746 student capacity or the equivalent thereof must be phased out.

Recommendations

We recommend that a committee be formed to conduct a study to determine specifically the number of schools to be phased out of operation, the selection of specific schools to be closed, the phase out timetable, the student transfer implementation plan, the redefined school boundaries and the recommended alternative use or disposition of the facility. This recommended approach of assigning a study group will assure that this issue receives an appropriate amount of attention and will assure that the potential annual and one-time savings are eventually realized. We recommend further that the study group use 85% utilization of capacity as its overall minimum objective in dealing with this problem. The study group should also consider the issue of a twelve month school year and develop a position paper stating its conclusions. To assist the study committee we have enclosed a listing (Exhibit A-3) of the top twenty elementary and middle schools ranked on the basis of required capital expenditures through 1980.

Benefits

Assuming the study committee achieves the minimum objective of 85% utilization of classroom space on a system-wide basis, nine *average size* schools or their equivalent will be

phased out, permitting the Dayton School District to realize a cost reduction of approximately $945,000 ($105,000 X 9) each year after the selected schools are closed. As a result of redefining school boundaries, some students will probably have to be transported to their new schools. We estimate the increased cost to approximate $50,000 to $200,000 depending upon the schools selected.

In addition to the annual savings defined above, the capital expenditures required to renovate the closed buildings will not have to be expended; thus saving the Dayton School District an estimated $2,000,000 to $3,000,000, depending upon the selection of schools to be closed.

ADDITIONAL COMMENTS

We analyzed the high schools' capacity, utilization and capital expenditure requirements statistics. We noted that, overall, they are utilizing eighty percent (80%) of their classroom capacity. The projected enrollments call for an increase of approximately 700 students by the 1975-76 school year which will increase the utilization rate to eighty-four percent (84%), which is close to the 85% minimum objective for elementary and middle schools. However, several additional facts should be considered by the study committee:

1. The declining enrollment in the elementary and middle schools will have an impact on the high schools after the 1975-76 school year.
2. Roosevelt High School has a projected capital expenditure requirement of $3,581,000 between 1972 and 1980 and has a student capacity of 1,904 students.
3. Kiser High School has a projected capital expenditure requirement of $583,000 between 1972 and 1980 (second only to Roosevelt among the high schools) and has a student capacity of only 714 which is far below the normal capacity for a high school.

It is readily apparent, based upon all of the foregoing data which we have presented, that phasing out schools and redistricting school boundaries is a *necessity* for sound finannancial management of the Dayton School District and one which requires immediate attention. However, the task assigned to the study committee is a very complex problem which will require detail analysis and careful planning for implementation. The phasing out of selected schools should take place over a time period that allows for proper transition and implementation, consistent with timely achievement of benefits. As a possible target date, it would appear that implementation could begin by September, 1973, if the committee becomes operational in the near future.

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H. ADDITIONAL OBSERVATIONS

TRANSPORTATION

The present policy of the Dayton Board of Education for transportation of students exceeds the requirements of the state law as revised in House Bill 475. All data presented excludes the cost effect of the freedom of enrollment policy since it cannot be accurately determined at the present time. The cost of providing the additional service in excess of the state requirement is approximately $250,000 per year. The cost benefit of this service should be analyzed to assure that it is a worthwhile expenditure of funds. If the Dayton Board of Education were to eliminate only the transportation of high school students, the cost of transportation would be reduced approximately $125,000.

Should the Dayton Board of Education decide to continue operating with the present policy, approximately $50,000 could be saved by replacing the services purchased from St. John's Transportation Company through the purchase and operation of Board owned buses.

Plaintiffs' Exhibit 56

MAINTENANCE

The primary problem facing the Dayton Board of Education in the maintenance area is the contract they have with the Dayton Building and Construction Trades Council, on behalf of its affiliated local unions. The contract requires craft specialization (skilled craftsman – plumbers, electricians, painters, etc.) within a maintenance function where job flexibility is necessary for efficient operation of a staff the size of Dayton's. Larger school districts can operate efficiently with specialized workers due to the number of personnel involved. Also, the contract sets hourly wages at 84% of each craftsman's journeyman's hourly wage rate in effect in the Dayton, Ohio area. Considering the fringe benefits the Dayton School System provides and the guarantee of working a full year (which is not true for construction craftsmen), the cost of maintenance work is the same for the Dayton School System whether they have their maintenance men perform the work or they contract for outside services, assuming equal productivity per hour. Unless better contract terms can be negotiated, we recommend that the Dayton Board of Education request proposals and seriously consider the possibility of entering into a maintenance contract with an outside firm. Since most problems with maintenance contracts are concerned with the level of service on emergency calls, the proposals should stipulate a guaranteed timing on emergency calls and/or not include an emergency provision, which would be covered by a small maintenance staff of the Dayton Board of Education.

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Plaintiffs Exhibit 71

Estimated Enrollments - Southwest District

High Schools	Present Capacity	1952-53	1953-54	1954-55	1955-56	1956-57	1957-58	1958-59	1959-60	1960-61	1961-62	1962-63	1963-64	1964-65
Dunbar	986	781	796	775	759	749	755	769	787	791	806	856	937	991
Roosevelt	2303	2178	2438	2674	2829	2959	3153	3172	3198	3088	3281	3386	3491	3683
Totals	3289	2959	3234	3449	3588	3708	3908	3941	3985	3879	4087	4242	4428	4674

Elementary Schools	K	1-8	K	1-8	K	1-8	K	1-8	K	1-8	1-8	1-8	1-8	1-8	Rooms 1952-53 K	C	O	R	Rooms Required K	C	S.L.	Rec.
Addams	101	464	79	481	82	491	77	509	(31)	516	496	-	-	-	1	1	2	14	1	1	2	14
Drexel	154	828	150	877	130	908	131	905	(64)	917	904	913	918	931	2	1	3	20	2	1	-	27
Edison	107	463	107	501	95	537	118	563	(51)	595	592	609	644	678	1	2	-	16	1.5	1	-	19
Garfield	95	560	104	600	116	614	112	648	(44)	667	661	-	-	-	1	1	7	13	1	1	2	18
Greene	82	391	92	399	90	405	103	421	(38)	448	459	-	-	-	1	-	-	12	1	1	-	13
Highview	91	437	84	474	79	487	79	498	(30)	510	507	-	-	-	1	1	-	15	1	1	-	15
Irving	127	697	106	664	116	680	125	677	(43)	701	679	-	-	-	1	2	2	20	1.5	1	2	19
Jackson	174	775	151	810	146	842	154	855	(66)	839	864	904	944	984	1	1	-	25	2	1	-	28
Longfellow	126	508	144	535	136	578	137	604	(91)	613	638	680	726	759	-	-	2	13	2	1	-	21
Residence Park	114	521	114	564	91	593	82	607	(40)	590	581	-	-	-	1	-	4	9	1	1	-	18
Weaver	143	845	137	845	152	851	169	887	(84)	941	954	998	1042	1084	2	1	5	20	2	1	-	30
Westwood	245	948	181	1044	200	1061	182	1068	(89)	1054	1048	1096	1123	1160	2	1	4	23	2	1	-	33
Whittier	136	557	126	595	128	600	141	638	(65)	654	655	675	706	730	-	2	-	15	1.5	2	-	21
Willard	203	981	237	1012	256	1093	230	1211	(117)	1270	1324	1408	1601	1660	-	2	5	19	2.5	1	3	46
Wogaman	151	1051	144	1059	166	1050	179	1058	(76)	1065	1036	-	-	-	-	2	3	25	2	1	3	30

Pltffs. Exhibit 71

Comparison of Pupil-Teacher Ratios in Dayton's Elementary Schools

Schools	1948-49	1949-50	1950-51	1951-52	Schools	1948-49	1949-50	1950-51	1951-52
Addams	39.7	31.6	28.3 1/	29.1 1/	Jackson	32.7 1/	37.9 1/	31.3 1/	31.3
Allen	34.1	38.5	32.1	30.5	Jefferson	36.6	36.7	34.4	32.8
Belmont	33.2	35.2	31.5	33.2	Kemp	32.3	28.0	29.1	29.4
Brown	41.0	39.4	35.9	34.8	Leuton	33.5	25.2	26.5	28.0
Central	32.9 1/	32.4 1/	29.8 1/	32.1 1/	Lincoln	34.4	33.8	29.6	28.2
Cleveland	33.0	31.2	29.1	29.9	Longfellow	35.0	33.3	30.5	30.8
Drexel	37.2	33.8	30.7	29.7	Loos	36.0	32.8	30.6	30.3
Edison	28.4	27.1	25.1	26.6	McGuffey	31.6	31.9	29.5	29.8
Emerson	34.0 1/	31.8 1/	30.4 1/	31.5 1/	Patterson	28.4 1/	26.7 1/	27.0 1/	24.3 1/
Fairview	32.4	34.2	32.3	31.9	Residence Park	33.8	32.6	37.1	33.0
Ft. McKinley	48.1	39.6	33.5	27.4	Ruskin	31.1 1/	30.4 1/	28.3 1/	28.4 1/
Franklin	37.1	34.8	29.0	27.7	Shiloh	30.6	30.3	29.2	28.6 1/
Garfield	33.1	32.9	30.5	29.3	Van Cleve	27.2	30.9	28.1 1/	26.8 1/
Gettysburg	----	39.9	32.6	31.6	Washington	32.8 1/	33.7 1/	30.4 1/	32.7 1/
U. S. Grant	37.6	34.5	27.4	30.3	Weaver	37.1	32.8	26.8	29.3
Grace A. Greene	26.2	24.9	25.4	28.4	Webster	33.6	33.2	31.9	30.9
Hawthorne	27.6	27.2	27.2	27.3	Westwood	37.3	36.9	34.3	30.4
Highview	----	----	----	30.1	Whittier	31.2	35.0	30.5	31.6
Huffman	29.9 1/	30.2 1/	28.3 1/	29.1 1/	Willard	32.3 1/	31.7 1/	30.3 1/	27.4 1/
Irving	35.3 1/	37.1 1/	35.6 1/	28.6 1/	Wogaman	28.4 1/	33.3 1/	33.0 1/	31.6 1/
City-wide Pupil-Teacher Ratios for Above Schools						33.4	33.2	30.6	30.1

1/ Includes one or more classes of Special Education or Slow-Learners.

PLAINTIFFS' EXHIBIT 75

Enrollment Estimates of Two Plans for
Redistricting of Westside Schools.

The choice of either of the following plans on their modification should be based upon several factors.

1. The resistance of some parents to sending their children to school in their district because it is an all negro school.

2. Additions to Willard and Garfield schools will involve purchase of improved property.

3. By decreasing the size of the existing districts and making additions to other schools it will give greater opportunity for some parents to move into a district that has a mixed school.

Plan A.

Leave the districts as they are except for that area between Willard and Wogaman schools that will be assigned to the new Elementary school on Danner Ave.,

Plan B.

Decrease the Wogaman district and add to Jackson and Weaver.

Decrease the Garfield district and add to Edison and Irving.

Since the Willard district is not involved in Plan B. the problem of additional space is dependent only upon the size at the new Westside school.

Plaintiffs' Exhibit 75

Present Planned Classrooms

	Willard	Westside
Kindergarten	2	2
Practical Arts	1	1
Regular classrooms	19	17
Sub-standard classrooms	4	
Multi-purpose room		1

Estimated Needs for 1958

	Willard	Westside
Kindergarten	2	2
Practical Arts	1	1
Regular classrooms	29	31
Multi-purpose rooms	1	

Conclusions – 14 room addition to the new Westside
10 room addition to the Willard school

	1952 Regular Classrooms	Required class-rooms for 1958		Required Class-rooms for 1960	
		Plan A	Plan B	Plan A	Plan B
Totals of Grade Level Rooms					
Garfield	13[a]	24	17	27	20
Edison	16	18	22	18	22
Irving	20	22	25	22	28
Wogaman	23	26	23	29	23
Jackson	25	25	29	28	31
Weaver	20	29	32	30	35
Estimated Enrollment divided by 35					
Garfield	13[a]	25	17	28	20
Edison	16	17	21	17	21
Irving	20	22	26	22	27
Wogaman	23	26	22	29	23
Jackson	25	26	29	28	31
Weaver	20	29	31	32	34

[a] Does not include 4 rooms in multi-purpose room

Plaintiffs' Exhibit 75

To summarize Plan A, the following additions would be required:

Garfield

1. 15 room addition at Garfield.
2. Purchase improved property in an area where the lots are irregular as to depth.
3. Remove partitions from present multi-purpose room.

Edison – 2 room addition
Irving – 2 room addition
Wogaman – 6 room addition
Jackson – 3 room addition
Weaver – 12 room addition

To summarize Plan B, the following additions would be required.

Garfield – 1. 7 room addition
2. Purchase improved property
3. Remove partitions
Edison – 6 room addition
Irving – 8 room addition
Wogaman – nothing
Jackson – 6 room addition
Weaver – 15 room addition

PLAINTIFFS' EXHIBIT 100A

Dayton Public Schools
NEGRO ENROLLMENTS AND FACULTY
1947-48

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1205	1205	100.0	100.0
Garfield	567	567	100.0	100.0
Willard	785	785	100.0	100.0
Wagaman	958	958	100.0	100.0
Total	3515*	3515*		
Mixed Schools				
Kiser	913	10	1.1	0.0
Parker	661	0	0.0	0.0
Roosevelt	2049	314	15.3	0.0
Stivers	1153	1	0.1	0.0
Wilbur Wright	1150	16	1.4	0.0
Addams	380	96	25.3	0.0
Allen	409	36	8.8	0.0
Central	600	241	40.2	0.0
Drexel	565	119	21.1	0.0
Edison	439	133	30.3	0.0
Emerson	1030	12	1.2	0.0
Greene	341	20	5.9	0.0
Huffman	769	3	0.4	0.0
Irving	850	218	25.6	0.0
Jackson	606	114	16.6	0.0
Longfellow	464	3	0.6	0.0
Ruskin	586	2	0.3	0.0
Washington	612	120	19.6	0.0
Weaver	678	403	59.4	0.0
Westwood	812	1	0.1	0.0
Whittier	525	94	17.9	0.0
Highview				
Gorman	111	8	7.2	0.0
Kennedy	65	0	0.0	0.0
Total	15848*	1964*		
White Schools				
Fairview High	837	0	0.0	0.0
Colonel White	814	0	0.0	0.0
Belmont	938	0	0.0	0.0
Brown	720	0	0.0	0.0
Cleveland	673	0	0.0	0.0
Fairview El.	658	0	0.0	0.0
Ft. McKinley	580	0	0.0	0.0
Franklin	446	0	0.0	0.0
Grant	275	0	0.0	0.0
Hawthorne	263	0	0.0	0.0
Jefferson	682	0	0.0	0.0
Kemp	228	0	0.0	0.0
Lewton	141	0	0.0	0.0
Lincoln	643	0	0.0	0.0
Loos	347	0	0.0	0.0
McGuffey	406	0	0.0	0.0
Patterson	499	0	0.0	0.0
Residence Park	133	0	0.0	0.0
Shiloh	314	0	0.0	0.0
Van Cleve	498	0	0.0	0.0
Webster	760	0	0.0	0.0
Total	10176**	5479*		
GRAND TOTAL	30569*			
GRAND TOTAL	30618**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

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PLAINTIFFS' EXHIBIT 100B

Dayton Public Schools
NEGRO ENROLLMENTS AND FACULTY
1948-49

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1234	1234	100.0	100.0
Garfield	595	595	100.0	100.0
Willard	907	907	100.0	100.0
Wagaman	877	877	100.0	100.0
Total	3613*	3613*		
Mixed Schools				
Kiser	901	6	0.7	0.0
Parker	671	4	0.6	0.0
Roosevelt	2115	365	17.3	0.0
Stivers	1130	5	0.4	0.0
Wilbur Wright	1162	15	1.3	0.0
Addams	405	118	29.1	0.0
Allen	423	39	9.2	0.0
Central	595	232	39.0	0.0
Drexel	633	156	24.6	0.0
Edison	437	120	27.5	0.0
Emerson	1054	15	1.4	0.0
Greene	351	17	4.8	0.0
Huffman	750	0	0.0	0.0
Irving	848	247	29.1	0.0
Jackson	712	170	23.9	0.0
Longfellow	476	3	0.6	0.0
Ruskin	616	2	0.3	0.0
Washington	610	121	19.8	0.0
Weaver	698	439	62.9	0.0
Westwood	806	0	0.0	0.0
Whittier	518	104	20.0	0.0
Highview				
Gorman	109	12	11.0	0.0
Kennedy	71	0	0.0	0.0
Total	16091*	2190*		
White Schools				
Fairview High	814	0	0.0	0.0
Colonel White	977	0	0.0	0.0
Belmont	977	0	0.0	0.0
Brown	747	0	0.0	0.0
Cleveland	700	0	0.0	0.0
Fairview El.	599	0	0.0	0.0
Ft. McKinley	674	0	0.0	0.0
Franklin	460	0	0.0	0.0
Grant	301	0	0.0	0.0
Hawthorne	258	0	0.0	0.0
Jefferson	756	0	0.0	0.0
Kemp	241	0	0.0	0.0
Lewton	171	0	0.0	0.0
Lincoln	647	0	0.0	0.0
Loos	439	0	0.0	0.0
McGuffey	481	0	0.0	0.0
Patterson	506	0	0.0	0.0
Residence Park	274	0	0.0	0.0
Shiloh	312	0	0.0	0.0
Van Cleve	473	0	0.0	0.0
Webster	718	0	0.0	0.0
Total	11101**	5603*		
GRAND TOTAL	31509*			
GRAND TOTAL	31533**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

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214-Ex.

PLAINTIFFS' EXHIBIT 100C

Dayton Public Schools

NEGRO ENROLLMENTS AND FACULTY

1949-50

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1208	1208	100.0	100.0
Garfield	611	611	100.0	100.0
Willard	866	866	100.0	100.0
Wogaman	1021	1021	100.0	100.0
Total	3706*	3706*		
Mixed Schools				
Kiser	903	8	0.9	0.0
Parker	595	5	0.8	0.0
Roosevelt	2224	431	19.4	0.0
Stivers	1169	7	0.6	0.0
Wilbur Wright	1193	15	1.3	0.0
Addams	341	94	27.6	0.0
Allen	477	34	7.1	0.0
Central	628	227	36.1	0.0
Drexel	740	175	23.6	0.0
Edison	418	139	33.3	0.0
Emerson	1082	16	1.5	0.0
Greene	334	22	6.6	0.0
Huffman	771	3	0.4	0.0
Irving	890	229	25.7	0.0
Jackson	746	154	20.6	0.0
Longfellow	450	2	0.4	0.0
Ruskin	601	1	0.2	0.0
Washington	634	115	18.1	0.0
Weaver	735	473	64.4	0.0
Westwood	833	1	0.1	0.0
Whittier	518	123	22.0	0.0
Highview				
Gorman	104	20	19.2	0.0
Kennedy	81	1	1.2	0.0
Total	16497*	2195*		
White Schools				
Fairview High	773	0	0.0	0.0
Colonel White	921	0	0.0	0.0
Belmont	1084	0	0.0	0.0
Brown	705	0	0.0	0.0
Cleveland	707	0	0.0	0.0
Fairview El.	773	0	0.0	0.0
Ft. McKinley	459	0	0.0	0.0
Franklin	487	0	0.0	0.0
Grant	324	0	0.0	0.0
Hawthorne	267	0	0.0	0.0
Jefferson	878	0	0.0	0.0
Kemp	244	0	0.0	0.0
Lawton	169	0	0.0	0.0
Lincoln	669	0	0.0	0.0
Loos	534	0	0.0	0.0
McGuffey	492	0	0.0	0.0
Patterson	478	0	0.0	0.0
Residence Park	346	0	0.0	0.0
Shiloh	287	0	0.0	0.0
Van Cleve	445	0	0.0	0.0
Webster	717	0	0.0	0.0
Total	11735**			
		5901*		
GRAND TOTAL	32552*			
GRAND TOTAL	32568**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

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PLAINTIFFS' EXHIBIT 100D

Dayton Public Schools

NEGRO ENROLLMENTS AND FACULTY

1950-51

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1132	1132	100.0	100.0
Garfield	685	685	100.0	100.0
Willard	818	818	100.0	100.0
Wogaman	1107	1107	100.0	100.0
Total	3742*	3742*		
Mixed Schools				
Kiser	910	7	0.8	0.0
Parker	624	5	0.8	0.0
Roosevelt	2305	642	27.8	0.0
Stivers	1129	9	0.8	0.0
Wilbur Wright	1289	22	1.7	0.0
Addams	405	123	30.4	0.0
Allen	475	46	9.7	0.0
Central	638	245	38.4	0.0
Drexel	742	189	25.5	0.0
Edison	432	186	43.1	0.0
Emerson	1158	24	2.1	0.0
Greene	358	28	7.8	0.0
Huffman	735	0	0.0	0.0
Irving	960	262	27.3	0.0
Jackson	785	206	26.2	0.0
Longfellow	494	4	0.8	0.0
Ruskin	600	2	0.3	0.0
Washington	653	124	19.0	0.0
Weaver	648	453	19.9	0.0
Westwood	860	1	0.1	0.0
Whittier	515	142	22.5	0.0
Highview				
Gorman	110	20	18.2	0.0
Kennedy	89	3	3.4	0.0
Total	16975*	2743*		
White Schools				
Fairview High	813	0	0.0	
Colonel White	909	0	0.0	
Belmont	1099	0	0.0	
Brown	729	0	0.0	
Cleveland	701	0	0.0	
Fairview El.	834	0	0.0	
Ft. McKinley	489	0	0.0	
Franklin	516	0	0.0	
Grant	365	0	0.0	
Hawthorne	283	0	0.0	
Jefferson	953	0	0.0	
Kemp	271	0	0.0	
Lawton	191	0	0.0	
Lincoln	670	0	0.0	
Loos	596	0	0.0	
McGuffey	486	0	0.0	
Patterson	478	0	0.0	
Residence Park	412	0	0.0	
Shiloh	286	0	0.0	
Van Cleve	506	0	0.0	
Webster	706	0	0.0	
Total	12291**			
		6485*		
GRAND TOTAL	33622*			
GRAND TOTAL	33663**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

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PLAINTIFFS' EXHIBIT 100E

Dayton Public Schools
NEGRO ENROLLMENTS AND FACULTY
1951-52

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1018	1018	100.0	100.0
Garfield	700	700	100.0	100.0
Willard	773	773	100.0	100.0
Wagaman	1111	1111	100.0	100.0
Total	3602*	3602*		
Mixed Schools				
Kiser	923	5	0.5	0.0
Parker	708	8	1.1	0.0
Roosevelt	2407	759	31.5	0.0
Stivers	1127	13	1.2	0.0
Wilbur Wright	1340	29	2.2	0.0
Addams	443	130	29.3	0.0
Allen	494	40	8.1	0.0
Central	687	233	33.9	0.0
Drexel	737	213	28.9	0.0
Edison	463	199	43.0	0.0
Emerson	1218	22	1.8	0.0
Greene	401	26	6.5	0.0
Huffman	774	1	0.1	0.0
Irving	669	312	46.6	0.0
Jackson	790	284	35.9	0.0
Longfellow	499	2	0.4	0.0
Ruskin	596	2	0.3	0.0
Washington	706	128	18.1	0.0
Weaver	639	432	67.6	4.0
Westwood	844	0	0.0	0.0
Whittier	538	161	29.9	0.0
Highview	409	7	1.7	0.0
Gorman	101	17	16.8	0.0
Kennedy	92	3	3.3	0.0
Total	17605*	3026*		
White Schools				
Fairview High	856	0	0.0	0.0
Colonel White	987	0	0.0	0.0
Belmont	1147	0	0.0	0.0
Brown	824	0	0.0	0.0
Cleveland	711	0	0.0	0.0
Fairview El.	905	0	0.0	0.0
Ft. McKinley	384	0	0.0	0.0
Franklin	504	0	0.0	0.0
Grant	400	0	0.0	0.0
Hawthorne	278	0	0.0	0.0
Jefferson	946	0	0.0	0.0
Kemp	276	0	0.0	0.0
Lawton	196	0	0.0	0.0
Lincoln	646	0	0.0	0.0
Loos	594	0	0.0	0.0
McGuffey	524	0	0.0	0.0
Patterson	456	0	0.0	0.0
Residence Park	462	0	0.0	0.0
Shiloh	303	0	0.0	0.0
Van Cleve	483	0	0.0	0.0
Webster	618	0	0.0	0.0
Total	12580**	6628*		
GRAND TOTAL	34610*			
GRAND TOTAL	34647**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

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PLAINTIFFS' EXHIBIT 130B

Dayton Public Schools
NEGRO ENROLLMENTS AND FACULTY
1951-52

Negro Schools	Total Enrollment	Negro Enrollment*	Percentage Negro	Percentage Negro Faculty***
Dunbar	1018	1018	100.0	100.0
Garfield	700	700	100.0	100.0
Willard	773	773	100.0	100.0
Wagaman	1111	1111	100.0	100.0
Total	3602*	3602*		
Mixed Schools				
Kiser	923	5	0.5	0.0
Parker	708	8	1.1	0.0
Roosevelt	2407	759	31.5	0.0
Stivers	1127	13	1.2	0.0
Wilbur Wright	1340	29	2.2	0.0
Addams	443	130	29.3	0.0
Allen	494	40	8.1	0.0
Central	687	233	33.9	0.0
Drexel	737	213	28.9	0.0
Edison	463	199	43.0	0.0
Emerson	1218	22	1.8	0.0
Greene	401	26	6.5	0.0
Huffman	774	1	0.1	0.0
Irving	669	312	46.6	0.0
Jackson	790	284	35.9	0.0
Longfellow	499	2	0.4	0.0
Ruskin	596	2	0.3	0.0
Washington	706	128	18.1	0.0
Weaver	639	432	67.6	4.0
Westwood	844	0	0.0	0.0
Whittier	538	161	29.9	0.0
Highview	409	7	1.7	0.0
Gorman	101	17*	16.8	0.0
Kennedy	92	3	3.3	0.0
Total	17605*	3026*		
White Schools				
Fairview High	856	0	0.0	0.0
Colonel White	987	0	0.0	0.0
Belmont	1147	0	0.0	0.0
Brown	824	0	0.0	0.0
Cleveland	711	0	0.0	0.0
Fairview El.	905	0	0.0	0.0
Ft. McKinley	384	0	0.0	0.0
Franklin	504	0	0.0	0.0
Grant	400	0	0.0	0.0
Hawthorne	278	0	0.0	0.0
Jefferson	946	0	0.0	0.0
Kemp	276	0	0.0	0.0
Lawton	196	0	0.0	0.0
Lincoln	646	0	0.0	0.0
Loos	594	0	0.0	0.0
McGuffey	524	0	0.0	0.0
Patterson	456	0	0.0	0.0
Residence Park	462	0	0.0	0.0
Shiloh	303	0	0.0	0.0
Van Cleve	483	0	0.0	0.0
Webster	618	0	0.0	0.0
Total	12580**	6628*		
GRAND TOTAL	34610*			
GRAND TOTAL	34647**			

*Research Department, 1952
**Annual enrollment report, Child Accounting
***School directories for the respective years

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PLAINTIFFS' EXHIBIT 130C

1963

Schools	Enrollment	# Black	% Black	# Teachers	# Black	% Black
Belmont H. S.	1768		0.0	70	1	1.4
Dunbar H. S.	1160		92.7	45	42	93.3
Fairview H. S.	1252		0.9	53	1	1.8
Kiser H. S.	740		2.7	38	2	5.3
Meadowdale H. S.	1154		0.0	44	2	4.5
Patterson Co-op	1090		1.8	49	1	2.0
Roosevelt H. S.	1650		94.5	82	22	26.8
Nettie Lee Roth H.S.	1120		53.5	46	11	23.9
Stivers H. S.	1150		3.6	55	4	7.2
Colonel White H.S.	1668		1.1	68	4	5.9
Wilbur Wright H.S.	1331		3.3	53	3	5.7
Cornell Heights	490		0.0	30.5	0	0.0
Longfellow	850		5.8	38	1	2.6
MacFarlane	1229		99.6	43	43	100.
Whittier	935		95.6	32	14	43.8
Orville Wright	750		0.0	25	1	4.0
Jane Adams	600		41.0	20	2	10.0
Allen	574		0.4	18	0	0.0
Belle Haven	1160		0.0	37	0	0.0
Belmont Elem.	794		0.0	26	0	0.0
Brown Elem.	1177		0.3	39	0	0.0
Carlson Elem.	144		95.9	9	9	100.
Cleveland	1180		0.0	25	0	0.0
Drexel	700		3.3	23	0	0.0
Eastwood	750		9.0	28	1	3.6
Edison	600		80.0	26	6	23.1
Emerson	1000		8.0	40	2	5.2
Fairport	780		0.0	26	0	0.0
Fairview Elem.	667		1.0	28	0	0.0
Fort McKinley	510		0.0	17	0	0.0
Franklin	691		0.0	23	0	0.0
Gardendale	176		7.9	8	1	12.5
Gettysbury	630		0.0	19	1	5.2
Gorman	102		15.6	9	1	11.1
U. S. Grant	917		0.0	31	1	3.2
Grace A. Greene	715		89.3	23	11	47.8
Hawthorne	316		0.0	10	0	0.0
Hickorydale	565		0.0	18	0	0.0
Highview	807		82.0	30	16	53.3
Huffman	834		0.9	35	5	14.3
Irving	1035		96.6	34	17	50.0
Jackson Elem.	1147		98.5	31	23	74.2
Jackson Prim.	537		96.2	18	11	61.1
Jefferson Elem.	1234		1.2	38	0	0.0
Kemp	725		0.0	24	0	0.0
Lawton	600		0.0	20	0	0.0
Lincoln	1145		0.0	33	1	3.0
Loose	783		1.9	27	0	0.0
Horace Mann	435		0.0	15	0	0.0
McGuffey	935		0.0	34	1	2.9
Meadowdale Elem.	930		0.0	29	0	0.0
Miami-Chapel	793		99.6	29	27	93.1
Patterson-Kennedy	630		0.0	P.22 K.18	1 5	4.5 27.8
Residence Park	1112		60.0	35	2	5.7
Ruskin	1171		0.0	38	1	2.6
Shiloh	492		2.4	17	0	0.0
Sheup Hill	318		0.9	10	0	0.0
Louise-Troy	791		99.8	23	22	95.7
Van Cleve	770		0.9	25	2	8.0
Washington	650		33.0	21	2	9.5
Weaver	1260		98.8	40	31	77.5
Webster	531		0.1	18	1	5.5
Westwood	1900		94.7	64	20	31.2
Wogaman	1100		100.0	37	37	100.

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PLAINTIFFS' EXHIBIT 130D

1960

Schools	Enrollment	# Black	% Black	# Teachers	# Black	% Black
Belmont H. S.	2009		0.09	87	5	5.8
Dunbar H. S.	1497		99.3	70	62	88.6
Fairview H. S.	1420		5.2-	77	5	6.5
Kiser	762		1.8	46	2	4.4
Meadowdale H. S.	1657		1.1	79	4	5.1
Patterson Co-op	1582		18.3	85	3	3.5
Roosevelt H. S.	2063		100.	104	68	65.4
Nettie Lee Roth	1398		92.3	69	50	72.5
Stivers	910		0.4	53	3	5.7
Colonel White H. S.	1751		19.3	85	5	5.9
Wilbur Wright H.S.	1410		3.5	72	5	7.0
Cornell Heights	864		44.2	34	3	8.8
Longfellow	1049		42.3	40	7	17.5
MacFarlane	1283		99.9	49	48	98.0
Whittier	819		99.2	33	21	63.6
Orville Wright	792		0. 0	30	1	3.3
Jane Adams	683		73.8	26	6	23.1
Allen	604		0.1	25	1	4.0
Belle Haven	1108		5.0	45	2	4.4
Belmont Elem.	657		0.0	27	1	3.7
Brown	1145		0.4	45	1	2.2
Carlson	614		99.0	25	21	84
Cleveland	1240		0.0	45	1	2.2
Drexel	638		5.7	26	2	7.7
Eastwood	844		0.0	37	1	2.7
Edison	522		97.3	18	16	89.9
Emerson	904		6.8	43	4	9.3
Fairport	844		0.1	34	2	5.9
Fairview Elem.	739		1.7	34	2	5.9
Fort McKinley	486		0.0	18	1	5.6
Franklin	850		0.0	37	1	2.7
Gardendale	284		28.5	11	3	27.3
Gettysbury	651		5.2	26	1	3.9
Gorman	90		21.1	14	0	0.0
U. S. Grant	755		0.1	32	2	6.3
Grace A. Greene	583		96.8	26	21	80.8
Hawthorne	291		0.0	12	0	0.0
Hickorydale	529		6.6	22	0	0.0
Highview	923		97.0	36	21	58.3
Huffman	976		0.0	41	3	7.3
Irving	855		99.0	35	26	74.3
Jackson Elem.	882		99.1	39	33	84.6
Jackson Primary	686		98.8	23	19	82.6
Jefferson Elem.	945		60.1	44	8	18.2
Jefferson Primary	488		57.1	23	9	39.1
Kemp	683		0.0	28	0	0.0
Lawton	536		0.0	22	0	0.0
Lincoln	1070		0.0	43	1	2.3
Loose	704		4.6	29	1	3.5
Horace Mann	344		0.2	14	0	0.0
McGuffey	951		14.4	25	1	2.8
McMary Park	536		99.4	22	19	86.4
Meadowdale Elem.	671		8.0	31	1	3.2
Miami Chapel	688		99.9	33	29	87.9
Patterson/Kennedy	565		0.0	26	1	3.9
Residence Park Elem	754		98.8	34	23	67.7
Residence Park Prim	435		99.3	16	11	68.8
Ruskin	930		7.0	39	1	2.6
Shiloh	582		0.1	19	0	0.0
Sheup Hill	364		7.1	15	1	6.7
Louise Troy	676		100.0	20	20	100
Valerie	463		7.5	19	1	5.3
Van Cleve	801		1.1	34	1	2.9
Washington	709		19.4	27	4	14.8
Weaver	1225		99.9	48	43	89.7
Webster	574		0.0	28	0	0.0
Westwood	1573		99.4	64	42	65.6
Wogaron	1078		100	41	40	97.4

PLAINTIFFS' EXHIBIT 143B

PLAINTIFF'S EXHIBIT 143 B

	S-1R Parkside Homes	S-2 S-2A DeSoto Bass	S-3 Summit Court	S-4 Edgewood Court	333053 Overlook Homes	333057 Vandalia Homes	333058 Moraine Fields	D-5 33384 Airport Homes	D-4 33384-2 Helena Homes	33252 Harshman Homes	33258 River Bend Lorm / River Bend Ltd	33259 Homevigus Court	33269 McGuffey Homes	33155 Desoto Bass	D-2 Bolander Homes	33260 Lakeview	33153 Annex #1	33272 Annex #2	33324 Brazil Lane	33310 Phyllis Wheatley Lorm	D-3 Richelieu Homes	33313 Miami Homes		S-6 Arlington Courts
1950 White	604	0	139	138	744	200	196	127	99	343	72	0	220	0	0	0	0	0	0	0	0			
Negro	0	310	0	0	0	0	0	0	0	0	0	160	0	200	33	60	201	60	100	100	22			
Other	0	0	0	0	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0			
1960 White	604	0	125	134	Sold 1-31-57	Closed 1-31-56	Closed 6-1-55	Closed June 1957	99	343	72	0	Closed 1-28-60 145	0	0	Closed 1-28-60	0	Closed 1-28-60 0	0	Destroyed 1952	0			1961 9
Negro	0	310	14	4					0	0	0	160	0	200	33		200	60	100		22			305
Other	0	0	0	0					0	0	0	0	0	0	0		0	0	0		0			0

Plaintiffs' Exhibit 143B

Race	Parkside Homes 5-1	DeSoto Bass Courts 5-2	Summit Courts 5-3	Edgewood 5-4	DeSoto Bass 5-5	Arlington Courts 5-6	Westdale 5-7A	Park Manor 5-7B	Metro Gardens 5-7C	Hillsp Homes 5-9	Cibaco 5-8	Metro Gardens Annex 5-11	1502 S. Smithville 5-12A	1432 Rosemont 1432 5-12B	40 E. Helena 5-12C	Huffman & Parnell 5-15A	641-647 Hickory Hill 5-15B
12-31-1963																	
White	602	0	122	125	0	5											
Negro	0	310	17	10	200	308											
Other	0	0	0	0	0	0											
12-31 1968																	
White	525	0	50	102	0	5	0	206	52	1							
Negro	79	307	89	36	193	309	136	14	11	208							
Other	0	0	0	0	0	0	0	0	0	0							
6-30 1972																	
White	363	0	14	54	1	1	0	197	40	2	49	17	21	27	6	9	0
Negro	226	310	124	83	198	311	136	23	23	208	30	7	1	1	8	3	2
Other	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	12 Vacant																

Plaintiffs' Exhibit 143B

	S-15 C	S-15 D	S-15 E	S-15 F	S-15 G	S-15 H	S-15 I	S-15 J	S-15 K	S-16	S-17	S-18 A	S-18 C	S-18 D	S-18 E	S-18 F	S-19
0-72																	
White	0	1	0	18	31	0	1	2	0	74	67	6	0	12	1	6	18
Negro	5	1	1	42	26	6	0	0	6	36	23	2	8	0	5	0	6
Other	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
0-72	S-20	S-21 A	S-21 B	S-23	S-24	S-26	S-30										
White	4	54	10	26	73	76	31										
Negro	111	45	22	22	28	61	19										
Other	0	0	0	1	0	0	0										

SOURCE: HUD 1235 report forms on all figures except for those of 1960. Those figures were obtained by using 1961 1235 forms and records showing the demolition of projects.

PLAINTIFFS' EXHIBIT 143J

August 31, 1951

Mr. William E. Bergeron, Director
Chicago Field Office
Public Housing Administration
201 N. Wells Street
Chicago, Illinois

Attention: Mr. Ed Klein

Dear Sir:

We enclose (2) school leases from Dayton Board of Education for use of the H-1 building on OHIO 5-2 and for the use of the small Community Building on OH-33155, De Soto Bass Courts, Dayton, Ohio.

The computation of charges at H-1 building are as follows:

R. M. & R.	$ 9.00
Heat	16.00
Water	3.00
Electricity	2.00
Janitorial	26.00
Janitorial Supplies	3.50
Rent	16.50
	$76.00

For the small Community Building at OH-33155 as follows:

R. M. & R.	$ 13.00
Heat	33.00
Water	4.00
Electricity	7.50
Janitorial	52.00
Janitorial Supplies	6.00
Rent	15.00
	$130.50

For non-heating months the charges are reduced the amount as shown.

Plaintiffs' Exhibit 143J

July 30, 1951

Mr. William E. Bergeron, Director
Chicago Field Office
Public Housing Administration
201 N. Wells Street
Chicago, Illinois

Attention: Mr. Ed Klein

Dear Sir:

We are in receipt of request from the Mad River Township Board of Education, the Van Buren Township Board of Education, and the Dayton City Board of Education for use of space in our various projects. The Mad River Board desires to use the Child Care Buildings at Overlook Homes Project OH-33093, and Harshman Homes, Project OH-33252. They have used these two buildings in the past, and while they have a new building under construction, they feel they will need these two buildings for another school year.

The Van Buren Township has a new 20 room elementary school building under construction on East Stroup Road, but it will also not be completed until the end of this coming school year. At that time they plan on using buses to transport the pupils from Moraine Fields, Project OH-33058.

The Dayton Board of Education is proceeding rapidly with their expansion plans, however, they have again requested the use of our N-1 Building at De Soto Bass Courts, Project 5-2 and 2A, and the small community building at OH-33155. They do not wish to use our space at McGuffey Homes, Project OH-33269, as the addition to the McGuffey School has been completed, and they are now able to take care of all the children.

We would appreciate your permission to negotiate with these school boards as we have in the past for leasing these spaces.

Plaintiffs' Exhibit 143J

Some time ago the Detroit office notified us that a new form of agreement would be used in the event the school boards desired use of our space. If you would be so good as to furnish us with a copy of this agreement for our use, we would greatly appreciate it.

Yours very truly,

Charlton D. Putnam
Director

RCC:mjh

Form SP-1913

Lease for Tenant Activity and Other Non-Commercial Space on (Federally Owned War Housing Projects Operated by Local Authorities).

1. Under the terms of this lease, made this 30th day of August, 1951, between the Dayton Metropolitan Housing Authority (herein called the "Lessor"), and Board of Education, Dayton, Ohio (herein called the "Lessee"), and subject to the conditions hereinafter set forth,

2. The Lessor does hereby let to the Lessee, and the Lessee hereby hires for the sole purpose of SCHOOL PURPOSES, the premises comprising part of Project No. OH 33155, located at De Soto Bass Courts, Dayton, Ohio, and described as follows: Small Community Building, rooms, and total leased sq. ft. area (2800 sq. feet) together with fixtures, equipment and supplies as set forth in the inventory which is attached hereto;

3. To Have and to Hold the Premises unto the Lessee, for the term of one School year, beginning on the 10th day of September, 1951 and ending on the .... day of June, 1952 at the rent and subject to the conditions as follows:

Plaintiffs' Exhibit 143J

4. Rent. The Lessee shall pay to the Lessor the sum of $ * rent per month and the sum of $ * per month to cover the cost of utilities as provided in Section 4a below, for each calendar month until this lease is properly terminated. Rent shall be paid in advance on the first day of the month to Dayton Metropolitan Housing Authority and shall be in the form of a check or money order payable to the order of Dayton Metropolitan Housing Authority.

* $130.50 for Heating Months and $97.50 for Non Heating Months, (Heat, Utilities & Janitorial furnished by Lessor).

In the event the payment of rent commences on any date other than the first day of a calendar month, or in the event this lease is terminated on any date other than the last day of any calendar month, the rent shall be prorated on a daily bases over the period during which the Lessee actually uses or occupies the Premises.

4a. *Utilities.* The Lessor will make available all normal utility services, including heat, water, gas and electricity required for the proper operation of the premises as equipped. The Lessee shall pay costs or estimated costs for utility services furnished by the Lessor and consumed by the Lessee in connection with the use and occupancy of the premises.

4b. *Janitorial Services.* The Lessee shall furnish janitorial services or pay the cost of such services provided by the Lessor.

5. *Compliance with Local Laws.* The Lessee shall, at its own expense obtain all necessary licenses and permits, and comply with all applicable laws and ordinances which may be promulgated by the United States, the State of Ohio or any political subdivision or agency thereof.

6. *Alterations and Fixtures.* The Lessee, at its own expense, may make any necessary or desirable alterations or remodeling on the premises and may install fixtures and equipment appurtenant to the Lessee's operations, provided that no alteration or remodeling shall be undertaken without the prior written consent of the Lessor.

Plaintiffs' Exhibit 143J

7. *Repairs and Maintenance.* The Lessee shall keep in good order the premises both exterior and interior, and shall maintain the interior and all appurtenances in good repair during the terms of this lease.

8. *Restoration and Surrender of Premises.* The Lessee, upon the termination of this lease, agrees (a) to remove all fixtures, equipment, and supplies installed on the premises by the Lessee; (b) to restore the premises to the same physical condition as they were at the beginning of the term, and surrender to the Lessor the premises in as good order and condition as when accepted, ordinary wear and deterioration excepted; and (c) to deliver to the Lessor all fixtures, equipment and supplies furnished by the Lessor as set forth in the attached inventory or an identical number of items of like kind and quality.

9. *Signs.* All exterior signs, displays, and advertising on the premises must be approved by the Lessor prior to installation.

10. *Subleasing.* The Lessee shall not sublease the premises without the prior written consent of the Lessor.

11. *Right of Entry.* The Lessor, acting through its agents, representatives or employees, shall have the right to enter upon the premises at any time during reasonable hours for the purpose of making inspections.

12. *Default and Reentry.* In the event of any default by the Lessee in the payment of any rent or other charges when due, or in the event of any breach of any other condition of this lease, the Lessor at its election, may terminate this lease and all rights of the Lessee hereunder by giving 30 days notice to the Lessee. Upon termination at the end of thirty (30) days, the Lessor, its agents or representatives shall have the right, without further demand or notice, to re-enter and take possession of the premises.

13. *Damage to Premises.* In the event the premises are rendered partially or wholly unfit for their use under the terms

of this lease by fire, tornado, earthquake or other casualty, this lease shall be automatically terminated as of the date of such happening. In such event the fixed rent herein provided for shall abate from the date of the happening of such casualty. There shall be a prompt accounting of the rent accrued to the date of termination, and any moneys disclosed to be owing the Lessee under the terms of this lease shall be promptly paid by the Lessor.

14. *Termination.* Either the Lessor or the Lessee may terminate this lease on thirty (30) days prior notice in writing to the other party, except that the Lessor shall not terminate a school lease during the school term unless the project is to be terminated at that time.

15. *Indemnity.* The Lessee will indemnify and save harmless the Lessor from all liability, claims, damages, or causes of action arising out of the Lessee's possession, use, maintenance, and operation of the premises or the fulfillment of its responsibilities in connection therewith.

16. *Notices.* Any notice desired or required to be given by the terms of this lease to the Lessor by the Lessee shall be given in writing addressed to Dayton Metropolitan Housing Authority at 702 Harries Building, Dayton 2, Ohio.

Any notice desired or required to be given by the terms of this lease to the Lessee by the Lessor shall be given in writing addressed to Board of Education, 232 N. Main Street, Dayton, Ohio.

17. *State Jurisdiction.* No provision of this lease shall be construed as depriving the State of Ohio or any political subdivision thereof of its civil and criminal jurisdiction over the premises.

18. *Members of Congress.* No member or Delegate to Congress, or Resident Commissioner shall be entitled to any share or part of this lease or any benefit that may arise therefrom.

19. *Non-Discrimination.* There shall be no discrimination

by reason of race, creed, color, national origin or political affiliations, against any employee or applicant for employment qualified by training and experience, for work in connection with this lease.

The Lessee shall include the foregoing provision in all contracts for any part of the work under this lease.

IN WITNESS WHEREOF, the Parties have executed this instrument on the 30th day of August, 1951.

Dayton Metropolitan Housing Authority, Lessor
By Director

Board of Education, Dayton, Ohio
By Clerk-Treas.

Witnesses:
/s/ VIRGINIA M. CARTER

230-Ex.

Plaintiffs' Exhibit 143J

[LETTERHEAD OF DAYTON BOARD OF EDUCATION]

July 28, 1953

Charlton D. Putnam, Director
Dayton Metropolitan Housing
Harries Building
Dayton 2, Ohio

Dear Sir:

I am taking this opportunity to Express the thanks of the Dayton Board of Education for the privileges which your organization has given them in granting them the use of your facilities for classes during the past years.

It has been a great help and a pleasure to use your building during this school housing emergency and we appreciate the many courtesies extended to our teachers and children.

With the rapidly increasing population in the city of Dayton we cannot tell just how soon we may have to ask your help again.

Sincerely yours,

/s/ F.G. CARLSON
F. G. Carlson, Asst. Supt.
Business Department.

231-Ex.

Plaintiffs' Exhibit 143J

[LETTERHEAD OF THE DAYTON BOARD OF EDUCATION, 232 N. Main Street, Dayton 2, Ohio]

TO: Dayton Metropolitan Housing Authority – De Soto Bass Harries Bldg., Dayton 2, Ohio.

RE: Kindergarten sessions – 1949-50.

This form is being sent to you to confirm verbal agreement and letter of acceptance from your church for the use of one or more classrooms and furniture for 1 sessions, including the following services:

School Wogaman

Heat X Light X Sanitary Facilities X
Use of playground X Janitorial Services X
Other

The Board of Education is to be billed at the end of each month in the amount of:

$60.00 per 4 week month – non-heat months
$75.00 per 4 week month with heat

The Board of Education wishes to thank you for your co-operation in helping to temporarily solve the over-crowded conditions of our schools in your community.

/s/ F. G. CARLSON
F. G. Carlson, Asst. Supt.
Business Department.

August 1949. Date

Plaintiffs' Exhibit 143J

[LETTERHEAD OF THE DAYTON BOARD OF EDUCATION, 232 N. Main Street, Dayton 2, Ohio]

TO: Dayton Metropolitan Housing Authority – McGuffey Homes
Harries Bldg., Dayton 2, Ohio.

RE: Kindergarten sessions – 1949-50.

This form is being sent to you to confirm verbal agreement and letter of acceptance from your church for the use of one or more classrooms and furniture for 2 sessions, including the following services:

School McGuffey

Heat X Light X Sanitary Facilities X
Use of playground X Janitorial Services X
Other

The Board of Education is to be billed at the end of each month in the amount of:

$57.95 per 4-wk. month – non-heat months
$91.35 per 4-wk. month – with heat

The Board of Education wishes to thank you for your co-operation in helping to temporarily solve the over-crowded conditions of our schools in your community.

/s/ F. G. CARLSON
F. G. Carlson, Asst. Supt.
Business Department.

Sept. 8, 1949. Date

Plaintiffs' Exhibit 143J

[LETTERHEAD OF THE DAYTON BOARD OF EDUCATION, 232 N. Main Street, Dayton 2, Ohio]

TO: Dayton Metropolitan Housing Authority – McGuffey Homes
Harries Bldg., Dayton 2, Ohio.

RE: Kindergarten sessions – 1949-50.

This form is being sent to you to confirm verbal agreement and letter of acceptance from your church for the use of one or more classrooms and furniture for 2 sessions, including the following services:

School McGuffey

Heat X Light X Sanitary Facilities X
Use of playground X Janitorial Services X
Other

The Board of Education is to be billed at the end of each month in the amount of:

$57.95 [$56.50]* per 4 wk month – non-heat months
$91.35 [$88.00]* per 4 wk month – with heat

The Board of Education wishes to thank you for your co-operation in helping to temporarily solve the over-crowded conditions of our schools in your community.

/s/ F. G. CARLSON
F. G. Carlson, Asst. Supt.
Business Department.

August 1949. Date

* Figures in brackets marked out on original copy.

PLAINTIFFS' EXHIBIT 150I

Dayton Public Schools
Racial Composition

School	Year	Black Student Composition	Black Teacher Composition
Garfield	1935	Approx. 50% black	Approx. 60% black
	1936	95% or more black	100% black
Wogaman	1943	Approx. 67% black	0% black
	1944	Approx. 90% black	0% black
	1945	95% or more black	100% black
Dunbar High	1933	100% black	100% black
Willard -	1934	Approx. 50% black	38% black
	1935	95% or more black	100% black

Sources: School directories and interviews with school personnel involved in the situations cited.

WPC:dw
111072

PLAINTIFFS' EXHIBIT 157B

(Portion of Deposition of Robert French)

[17] A. (Mr. French) I understand that there was some variation, children were permitted to transfer to other schools because of health or distance, doctor's certificates and that sort of thing, and that was stopped in 1952, I believe.

Q. Why did you stop that?

A. Because they didn't want any accusations that people were permitted to escape the neighborhood school.

Q. In other words, when you came in in 1947 you found a pretty flexible thing, situation with regard to transfers?

A. I wouldn't say it was flexible and I don't think there was too much of this transferring, but you would have to talk to Mr. Armstrong about that.

Q. Well, some of the school board records that we have indicate that in 1951-52, the same dates you just mentioned, that at this time definite times were established and we took it to mean that they were enforced.

A. Enforced, that is right.

Q. And that in that context there were substantial transfers back and fourth and you put an end to it?

A. That is right.

• • •

[18] Q. (BY MR. LUCAS) And you mentioned in your testimony already something about optional attendance areas. Can you tell me what these were and how they operated?

A. Well, there were various reasons for it.

Q. Excuse me. Were there a large number of them when you came that – I gather in '52 you made boundaries definite. Did you eliminate some of the optional attendance areas at that time?

• • •

Q. Mr. French, if we can get on, I believe [19] your testimony was that you made the boundaries definite and cut out a lot of transfers?

A. I didn't say a lot of transfers.

Q. Well, what did you cut out? Did you only cut out some of them?

A We cut out all of them as far as I know.

Q. All right, you cut out the transfers. Did you also when you came in, or by 1952, eliminate a number of optional attendance areas?

A. I don't recall this.

Q. Well, were there optional attendance areas when you came in?

A. I can't speak for that.

Q. You don't know whether or not there were any optional attendance areas?

A. But I know we established a number of optional areas.

Q. All right. Can you tell me which ones they were that you established?

A. No, I can't.

Q. Can you tell me any of them?

A. Well, my memory is not too good on that.

Q. Have you been studying in preparation for the case trying to refresh your memory?

A. Yes.

[20] Q. What documents have you been looking at?

A. Well, I had some material that our attorney gave me.

Q. Were these School Board records?

A. No, I don't look at any School Board records.

Q. What kind of records have you been studying in preparation for the case?

A. I wasn't studying any records.

• • •

Q. What have you been studying in connection with the case?

A. I read the material that our attorney had prepared, and that is it.

Q. You are talking about legal pleadings or analysis of data? What is it we are talking about?

A. No, just what happened in the matter of integration of pupils when I was superintendent.

Q. Did that refresh your recollection about what happened?

A. Yes.

Q. O.K. Was there anything in there about optional attendance zones?

[21] A. Yes.

Q. Well, you said just a few minutes ago you didn't remember anything about them. Now what has this material refreshed?

A. I told you there were a number of them.

Q. O.K. Can you remember any of them?

A. Well, there was one between Roosevelt and Colonel White.

Q. Can you tell me about when that was established?

A. That was established shortly after Colonel White became a four-year high school. And as a result of pleading by citizens of the area who testified that it would be much shorter distance for their children to go to Colonel White, and that the transportation would be much more satisfactory because to go to Roosevelt they had to go downtown and transfer, and to go to Colonel White it would be a straight shot.

Q. Where would they have gone before Colonel White became a four-year school?

A. They would have gone to Roosevelt.

Q. Was Colonel White built brand new? Or was it converted?

A. It was converted.

Q. What had it been before?

A. Two-year high school.

• • •

[27] Q. Mr. French, you were telling us about the establishment or the expansion as it now appears of the optional area between Colonel White and Roosevelt High School at the time Colonel White became a four-year school.

Now, our understanding of the boundary lines are that the cross hatched area shown on the 1970 map, that the Northern boundary of that is the boundary of the Roosevelt zone so that the option does exist as a part of the Roosevelt zone, and you had testified that the parents petitioned or testified to you their desire to continue to send their kids to some school.

Now, let's pick up from there. You said that they came and wanted to keep sending their kids to some school and you explain it from there, to all of us.

A. They said that they couldn't see why their youngsters couldn't attend Colonel White because it was closer and that the transportation was better, and this [28] agitation went on for a couple of years. We made a study of it and had a meeting on it and decided that it was a logical and legitimate complaint, and therefore we said the children in this area could have the choice of either going to Roosevelt or to Colonel White.

Q. And you mentioned also that some of them had gone to Fairview, which is North and slightly West?

A. I didn't say that, I didn't say that because I don't know.

Q. I believe you are the one that got started on that. Where would children in this optional area have gone to school before Colonel White became a four-year school? Did they go to Roosevelt?

A. Well, maybe they did go to Fairview. I just don't know.

Q. Well, they were complaining because it was too far to go to Roosevelt?

• • •

[30] A. My recollection is zero on that. It would have come about through a study of our Pupil Personnel and I presume it was Kiser always had a problem of having enough youngsters. It took them, it was between Kiser and where, Roosevelt?

Q. And Colonel White.

A. Colonel White. I don't know.

Q. O.K. The material that has this furnished to you, does it contain any discussion of that that might help your recollection?

A. No.

Q. What other optional areas have been brought to your attention in connection with this material?

A. Well, there were a number of optional areas between elementary schools, and I would have to ask our attorney to refresh my memory.

Q. Well, do you have the document that you have been studying with you?

A. No.

• • •

[39] Q. We are getting into tag words again. What do you mean by liberal?

A. Mason Bagwell was a liberal. Royer was very sympathetic with trying to break down segregation. Armstrong —

Q. These were people that were concerned about the problems of racial isolation in the schools?

A. We all were.

Q. Did you take those things into account in trying to deal with the problems as they arose in administration?

A. Yes, we did.

Q. And how did you go about doing that?

A. Well, I think you are aware of the fact that we called a meeting of the Black community leaders when we were going into a very big building program, suggested to them that we shrink some of the core city school and build the additions on the fringe so that the schools would become integrated, and we did a great deal of this.

Q. What happened as a result of that?

A. Well, unfortunately the schools in sight of three years became racially segregated as they were before.

Q. One of the problems of that is the fact that people

just moved out to the next layer of whiter schools, both in the City and out of the City?

A. That is right, but a very definite attempt was made to –

[40] Q. About when was that, Mr. French, approximately?

A. Well, I don't know the year.

Q. What schools?

A. Probably 1956 or so.

Q. What schools were involved?

A. Well, eliminated the Willard School and the Garfield School.

Q. City Plan recommended that you get rid of those?

A. What?

Q. City Plan –

A. Not to my knowledge.

Q. City Plan for Dayton recommended that you get rid of those schools, did it not?

A. Not to my knowledge. I don't remember that it did.

Q. The shrinking of the boundaries, what schools were involved in that; Garfield and Willard, that you shrunk the boundaries on?

A. Wes, well, yes. I can't give you the details on it but we built a number of additions on the fringe areas and for two or three years these schools were pretty well integrated.

Q Okay. Did you make any efforts to integrate the next layer of White schools beyond this fringe area that you are talking about? You said you built and expanded in the fringe area. Did you make any effort to deal with [41] the next area, which was all White at that time? This was just an isolated situation where you were trying to deal with Willard?

A. Well, there were times when we moved in that direction.

Q. But not at the same time that you did these schools?

A. No.

Q. One of the problems, then, was the fact that these other schools were made White helped make these fringe area schools change so rapidly; is that your statement?

A. Say that again.

Q. All right. You shrunk the Black schools, you shrunk the Black schools?

A. Yes.

Q. Okay. And you had some expansion in the fringe area?

A. Yes.

Q. But that fringe area changed in three years, became all Black?

A. Yes.

Q. My question was, and I think you have already answered that part of it, is that were these schools, say north or east of the fringe area which were all White didn't have any Black children or very, very few?

A. I wouldn't say – yes, some.

[42] Q. Greatly different from the fringe area schools?

A. Yes.

Q. And I am saying was not one of the problems that made this conversion take place the fact that these schools beyond the fringe area were White, they attracted parents moving out, the White parents moving out from the integrated situation?

A. Well, that is an assumption.

Q. I mean that is an experience that you as an administrator, as other administrators have had; isn't that correct?

A. Yes.

Q. So the fact that those schools were White affected the success or lack of success of the efforts that you were trying to make in that area?

A. Yes.

Q. I don't mean to say that is a special situation. It has happened to lots of people. Is that the only area where you tried that particular thing? After your lack of success with that particular thing did you try it elsewhere?

A. Well, after that we placed all of the new construction where the children lived.

Q. You really gave up on that particular experiment that you had done?

A. Yes.

[43] Q. When you say you placed the school where children lived, do you mean where they are now or where you project them to be?

A. Both.

Q. You have to when you build a new school in a developing area provide excess capacity to take care –

A. That is right, anticipated growth.

Q. Sometimes it is having to make a good guess of how much growth you are going to have?

A. We had some tools that worked pretty accurately.

Q. Mostly experience, though?

A. Yes.

Q. What other efforts did you make in connection with – let me go back.

What kind of problems did such things as war housing, public housing, which at that time was built on a racial basis, what kind of problems did that create for you as an administrator in dealing with the racial isolation in the schools? You have mentioned staff was liberal.

• • •

[44] A. There is no question on anybody's mind when we got word of a public housing project we knew we had to build a school somewhere near it to take care of the children that lived there.

Q. They had to have a letter from you, from the Board saying that school facilities would be made available, did they not?

A. We –

Q. They had to get it for their records to build it; didn't they?

A. I am not sure about this, but I know we kept in close contact with the housing people.

Q. And at that time their policy was building Black projects and White projects; is that correct?

A. This I don't know. All I know is that when we knew that a certain number of units was going in in a certain [45] area we knew we had to move to get school accommodations for them. It was just that simple.

Q. Let's put aside the question of policy at the moment. As a practical matter when they opened they were usually Black or White?

• • •

Q. Do you know that?

A. I don't know that.

Q. You don't know what a housing project's racial composition was when they opened?

A. I don't think we even discussed the racial end of it at all.

Q. Do you know what happened when it opened? Was the school, the children who came into the schools, were they Black or White in these various projects?

A. I never discussed it with anyone.

Q. I didn't say you discussed it. You knew it, didn't you?

A. Well now, what areas are you talking about, Desoto Bass?

Q. That is one.

A. Well –

Q. A lot of expansion in that particular project, wasn't there?

[46] A. All we knew was that they were going to build so many units.

Q. Didn't the school district actually rent space in these public housing and war housing for classrooms and have teachers in them teaching in those buildings?

A. We may have.

Q. You recall that you did?

Plaintiffs' Exhibit 157B

A. No, I don't.

Q. You are not surprised of the fact that the records of the housing authority might show that, that would not be unusual in your experience?

A. Yes, I think it would be unusual but it might have happened.

Q. Did you ever go around and visit the schools, Mr. French?

A. Yes.

Q. I take it your vision was pretty good then, you could tell whether the schools were Black or White by looking at the pupils, couldn't you?

A. Yes.

Q. Did you visit any of these schools or expansions or additions that resulted from these housing projects, housing authority developments?

A. Yes.

• • •

PLAINTIFFS' EXHIBIT 157C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

DEPOSITION OF DR. WAYNE CARLE

DEPOSITION OF DR. WAYNE CARLE, taken before me, F. L. Seymour, Notary Public in Montgomery County, for the State of Ohio, pursuant to agreement of counsel, at 1:30 o'clock p.m., Monday, June 19, 1972, in the office of Dr. Wayne Carle, 348 West First Street, Dayton, Ohio.

• • •

[3] WHEREUPON:

Dr. Wayne Carle

the witness having been duly sworn, was examined and testified as follows:

MR. DIAMOND: We are convened today pursuant to agreement of the parties to take the deposition of Dr. Wayne Carle, pursuant to the Federal Rules of Civil Procedure in the case of Brinkman versus Gilligan.

Plaintiffs' Exhibit 157C

DIRECT EXAMINATION

BY MR. DIAMOND:

Q Dr. Carle, there will be a pre-trial conference on Friday, in Judge Rubin's chambers, and Plaintiffs are particularly interested here today in exploring with you the necessity of immediate planning or the efficiency of having planning begin on the implementation of the desegregation plan which was previously adopted by the Dayton School Board, and to lay the background for that inquiry, if you would, please, could you briefly summarize the history of the resolutions and planning which led to adoption of that plan of desegregation?

A Yes.

MR. GREER: We object insofar as all this is a matter of record from the School Board minutes. Go ahead and proceed.

[4] THE WITNESS: The concern about racialization in the Dayton Schools dates back at least four years, but in particular, would be associated with several specific events. One was the notice received in the fall of 1958 of a compliance review by the Office for Civil Rights of the Department of Health, Education, and Welfare, which constituted a study of the Dayton Schools, as continued to the present, and resulted in the following spring in a letter notifying the district that it was in non-compliance with respect to the assignment of schools, expressing concern for the substantial neutrality of enrollment of pupils in the school, and asking that the district take action to rectify it.

The Board of Education subsequently adopted the resolution notifying the federal government that staff would be desegregated, and under a separate action, applied for a federal grant for the purpose of studying the pupil segregation and other aspects of the problem of desegregation. This would be in 1969. At about the same time, a citizen's committee, which was called the Citizens Advisory Council to the Dayton Board of Education, studied all aspects of school operation, and considered as part of its task, the problem of racialization.

Plaintiffs' Exhibit 157C

As the result of those initial activities, the desegre- [5] gation of staff was undertaken, and essentially completed this last fall, the fall of 1971, and a series of studies made of enrollment patterns of approaches to human relations, including in-service education of administrators and teachers, and finally, a resolution by the Board of Education in the spring of 1971 – I should precede that by saying that in December of 1970, a complete report up to that point was submitted under the title "School Integration," noting that there were many alternatives that could be explored, all the way from doing nothing, to completely desegregating the schools, and then in the spring of 1971, a Board resolution noted the problem of racialization, called upon the State Department of Education to make recommendations regarding alternatives available for reducing racial and economic isolation of pupils, and authorizing the President of the Board to establish a citizens committee, which subsequently became known as the Committee of 75, to examine the recommendations of the State Department of Education, and make recommendations to the Board of Education.

That committee then embarked upon a series of meetings and studies which culminated in late autumn with a report entitled "Report of the Committee of 75," which not only summarized the activities of that committee, but noted racialization as being the number one problem in the Dayton [6] schools, and urging the Board to proceed with solutions to it. Subsequent to that report, the Board then acted upon, in December of 1971, three resolutions that were designed, first, to call upon the Greater Dayton community to recognize the problems of racial and economic isolation in housing, employment, and education, and to join in bringing about justice and equality, and, secondly, calling upon the State Department of Education to require all the school districts in the metropolitan area, planning for the ending of racial and economic isolation, and requiring them to implement those plans by September of 1973, and in the third resolution, rescinding the present attendance boundaries of the Dayton Schools, setting

up criteria for the desegregation of schools, and directing the superintendent to develop and implement a plan for integrating the Dayton Schools by September of 1972.

BY MR. DIAMOND:

Q Let me interrupt you here, Dr. Carle. How long have you been with the Dayton Schools?

A Four years.

Q And in that four-year period, what was your position?

A Superintendent of schools, the chief executive officer of the Board of Education.

Q And could you give me the date, approximately, when you [7] started in that position?

A June 10, 1968.

Q And what did you do before then?

A I was assistant state superintendent of public instruction.

Q For the State of Ohio?

A For the State of Ohio.

Q And what did you do before then?

A I was assistant superintendent of the Akron Ohio Schools.

Q And how long had you been in those two positions?

A Two years in the State position, and seven years in the Akron position.

Q And what was your background before that?

A High school and college teacher.

Q And what systems?

A In Utah; Provo, Utah, and in Dushane, Utah.

Q What is your educational background?

A Bachelor and Master Degrees in English and educational administration from Brigham Young University in Utah. A Ph. D. Degree in education at Ohio State University.

Q In your educational background, and in your experience in these various positions, have you come to be familiar with all phases of educational administration at the elementary and secondary level?

A I believe so, insofar as is possible for one to be [8] familiar with all phases today.

Q I have here three documents. Would you tell me what they are?

A These are marked one, two and three, and constitute resolutions adopted by the Board of Education as I described, calling upon area cooperation, State Board of Education and the State of Ohio action, and local district action to desegregate the schools.

Q Are these the resolutions that you referred to that were adopted by the Board in December of 1971?

A Yes, they are.

Q I am going to read a statement from these resolutions, and ask you a question based thereon. "This Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and in-actions of this and predecessor Boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs. That this Board recognizes that past actions or in-actions of the Board of Education and residential racial segregation are interdependent phenomena. Segregated educational opportunity and unequal educational opportunities [9] for minority and poor students now exist in the Dayton public schools, and this inequality exists as a result of the acts and omissions of this Board and preceding Boards in their decisions concerning the site selection of school buildings, size of school buildings, changes and adoptions of school attendance boundaries, pupil assignment practices, faculty and staff hiring and assignment practices."

Q Dr. Carle, in your experience as four years of the superintendent of the Dayton public schools, do you agree with the sum and substance of those resolutions?

MR. GREER: I object.

MR. HOLSCHUH: For the record, I feel that I should note an objection. First, on the basis that the proported reso-

lutions from which you have apparently read are not in evidence, and secondly, and certainly more importantly, you are seeking to get from this witness his personal opinion as to whether he concurs in the opinions of somebody else as set forth in that resolution. I would have no objection, of course, to any questions that you want to ask Dr. Carle concerning the facts, statistics, figures, but the objection goes to your calling for an opinion and conclusion of this witness.

[10] MR. GREER: We have the same objection on behalf of the Dayton Board of Education.

MR. FLEISCHAUER: I will enter the same objection on behalf of Dr. Carle.

BY MR. DIAMOND:

Q The witness may now answer the question.

A In the past four years, I have had considerable opportunity to review the history of the school district, and to be acquainted with the present condition of the schools. The paragraphs to which you alluded had to do with the impact of Board actions or in-actions through policy or procedure, the relationship of housing, and the impact of other governmental policies or procedures through housing, and the relationship of the operation of the schools to the education of boys and girls in the city district in relation to these actions or in-actions.

In each case, I would support that the allegations made in those paragraphs are factual, and that they are at the heart of the confronting education in urban centers of this country.

MR. HOLSCHUH: I move to strike, for the reasons I previously stated, and for the additional reason that the witness answer is clearly based upon what he has read or heard, and founded upon hearsay.

[11] MR. GREER: We will have the same motion. I think it's clear from the witness's answer that he is referring to a generalized state of affairs throughout the whole country, more than any specific thing the School Board of Dayton did or failed to do.

BY MR. DIAMOND:

Q Dr. Carle, does your answer reflect your personal experience here in Dayton?

A Yes. I thought I had emphasized that in the preamble, that the judgment is based upon my experience with the schools as they now are, and as the records indicate they have been.

MR. HOLSCHUH: The same motion.

MR. GREER: To save time, would it be agreeable to all concerned that if one party makes an objection, it will stand as the objection for all of the defendants, unless somebody speaks up and disaffirms it?

MR. DIAMOND: That's fine with us.

BY MR. DIAMOND:

Q In your answer, Dr. Carle, you referred to not only your personal experience, but your examination of records. Were those the records of the Dayton schools which are under your possession?

[12] A Yes.

Q In the resolution of December, 1971, in relationship to the planning, what were the basic criteria that were set up by the school board in attempting to achieve desegregation of the Dayton schools for September, 1972?

MR. HOLSCHUH: You are referring to what is in the resolution, Mr. Diamond?

MR. DIAMOND: Yes.

BY MR. DIAMOND:

Q You were directed, I understand, according to your answer, by the Board to undertake that planning, and I am asking you now, what were the criteria upon which you undertook that planning? What steps did you take? Did you hire outside consultants? Did you do it yourself? How did that proceed from December of 1971?

A The basic criterion was that no building would have a racial composition or family income characteristic which was substantially disproportionate to the district as a whole. In other words, that each school would reflect roughly a cross section of the school district. The records to which I referred earlier in the reports, particularly had examined a number of desegregation plans and implementations across the country over the past two or three years, so that we were aware of a number of factors which appeared [13] to be useful and successful, and some perhaps which were less justifiable, and so that I was interested, when the Board gave me the assignment of developing a plan, in including the very best qualities that could be set forth in relation to experience in other urban centers, particularly.

I had heard that Dr. Gordon Foster, at the University of Miami, had been involved in several of those plans, and had also, of course, previously resided in this area while a member of the University of Miami, Ohio. I, therefore, immediately contacted Dr. Foster to see whether he would have time to assist us with planning, since he is also director of the school desegregation center in Miami, and he was willing to make his experience available, although it was done as an individual, not as an activity of that center.

He then drew together a planning team, and came to Dayton to examine the district, the buildings, the records, and after amassing that information, returned to Florida and worked on a draft of the plan, which we then reviewed with the members of my staff, and was finally formulated into a proposal which I approved on January 3, I believe, of this year, 1972.

In that process, Dr. Foster consulted widely in the community [14] with various community leaders, as well as conversations with persons on the street and in the schools, with particular reference to minority points of view, as well as to the establishment points of view, and developed a plan which incorporates many positive features that have proven desirable elsewhere. Among these are the continued –

MR. HOLSCHUH: Excuse me, Dr. Carle, but I would object. I don't think that's responsive. I think Mr. Diamond's question was, what did you do as a result of the Board resolution.

MR. DIAMOND: To the contrary, I think it is responsive.

THE WITNESS: May I continue?

MR. HOLSCHUH: Aren't you now asking him for his opinion of the plan?

MR. DIAMOND: I presume he is telling me – He just said he recommended the plan to the Board. He is giving me the reasons. This presumably goes in to his response to the Board's call upon him.

MR. HOLSCHUH: Well, I understood your question was, what action did he take in response to the Board's call, and I expected his answer to be limited to that action. Note my objection. Go ahead, Doctor.

[15] THE WITNESS: I was attempting to illustrate the extent to which the consultation had taken into account plans elsewhere.

BY MR. DIAMOND:

Q Did your planning and your consultation with Dr. Foster, and did Dr. Foster have access to and the benefit of the previous planning of, say, the Committee of '75?

A Yes, all the pertinent records to which I referred to earlier were made available to Dr. Foster, and in addition to that, he visited school buildings, collected additional records from our operation, such as the Ohio State University building facility survey, which had been completed the year before, and as I say, consulted with groups in the community. Then the point I was trying to make with regard to the nature of his planning, and the criteria that we used, one feature was that students continued to attend schools as a neighborhood group. That assignment to school would have been by neigh-

borhood areas. That roughly proportional groups of white and black and high and low income students would have been moving, so that no one group assumed anymore burden or sacrifice of the plan than another, and that it was not necessary to assign any pupil to a building on the basis of individual characteristics of race or income, but rather on a group criteria that would certainly not depart [16] from any past practice or guarantee of individuality.

Q I show you a document. Would you describe what that is?

A This is entitled "Desegregation Study, Dayton Public Schools, Dayton, Ohio," and is the plan developed by Dr. Gordon Foster, and submitted to me pursuant to the direction I received from the Board of Education.

Q Is that the plan, then, that you recomemnded that the Board of Education adopt?

A It is.

Q And was that recommendation based on the criteria which you have mentioned?

A May I re-reply to your question?

Q Yes.

A Could I have the question back?

(Whereupon, the question referred to was read by the Reporter.)

THE WITNESS: May I change that answer?

MR. DIAMOND: Sure.

THE WITNESS: I did not recommend it to the Board, since the Board had already given me both the direction and authority to plan and implement desegregation of schools. I simply announced publicly that this plan was adopted, and was in the process of being implemented. [17] There was no necessity for Board action on the plan.

BY MR. DIAMOND:

Q Was that decision based upon the criteria which you have mentioned?

A Yes, it was.

Q Based on those criteria and the plan, in your experience, is the plan both educationally sound and administratively feasible?

MR. HOLSCHUH: Objection.

THE WITNESS: Yes.

BY MR. DIAMOND:

Q What, then, happened, Dr. Carle, in terms of the history if you can bring us up-to-date?

A The Board of Education had three new members after the acceptance of this plan, and subsequent to that, adopted resolutions designed to rescind the previous action of the Board, and indeed the resolutions were somewhat parallel in construction, except worded in the negative, and substituting other actions, rather than the desegregation of schools.

Q And when that occur, approximately?

A In January. I do not recollect whether it was the first or second meeting of the Board.

Q In terms of the plan, which I will describe as that of [18] January 3, 1972, to desegregate the Dayton Public Schools, would it be beneficial for implementation for the fall of 1972, if the details of the planning began as soon as possible.

MR. HOLSCHUH: Objection.

MR. GREER: The same objection.

THE WITNESS: It is desirable to have as much lead-time in planning as possible, but the plan itself is reasonably complete, and requires only detail work to be placed into effect, so that time is not really of the essence, other than it would be desirable to have as much lead-time as possible for information, and for community involvement purposes.

BY MR. DIAMOND:

Q Let me ask the question this way: As the Chief Administrative Officer of this school system, would it be helpful to you in the procurement of transportation, in the notification to

Plaintiffs' Exhibit 157C

students of assignments, to have it known, if you were going to implement the plan in the fall of 1972, to have that knowledge imparted to you, June 31, as opposed to August 31?

A Definitely. The original intent, of course, was that the time from January through September would have beeen available for that implementation, and obviously, the closer it gets, the more intensified would be the preparations [19] that would have to be carried out.

Q In your opinion, Dr. Carle, do you believe that the plan, as of this date, can be implemented for fall of 1972?

A I base my answer on the fact that more complicated plans have been implemented in other communities in less time than now remains between now and September. I would say yes.

MR. DIAMOND: I have no further questions.

CROSS EXAMINATION

BY MR. GREER:

Q Dr. Carle, let me try to get some of the chronology straight on some of these events. What was the meeting, or what was the date of the meeting, in December of 1971, when these three resolutions you have discussed with Mr. Diamond were contracted by the Board?

A I believe the date was December 8.

Q Prior to that time, there had been an election of three new Board members, had there not?

A In November there had been an election, yes.

Q And it was known at the time of the meeting of December 8, who the three new Board members would be, and that they would take office on January 1 of 1972?

A That's correct.

• • •

PLAINTIFFS' EXHIBIT 157D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

Civil Action No. 72/137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

DEPOSITION OF MARTIN W. ESSEX

DEPOSITION OF MARTIN W. ESSEX, a witness of lawful age, taken on behalf of the Plaintiffs in the above entitled cause, pursuant to stipulation, before Sara W. Stewart, a Notary Public in and for the State of Ohio, at the offices of Beiser, Greer & Landis, 8 N. Main St., Dayton, Ohio, on the 11th day of November, 1972, at 10:00 o'clock a.m.,

APPEARANCES:

On behalf of the Plaintiffs: Louis Lucas, Attorney at law, 61 Kirkland St., Cambridge, Massachusetts;

On behalf of the Defendant, the Dayton Board of Education: Beiser, Greer & Landis, by David C. Greer, Attorney at law, 2nd Floor, 8 N. Main St., Dayton, Ohio;
On behalf of the Defendants, the State Board of Education, and Dr. Martin Essex: Alexander, Ebinger, Holschuh & Fisher by John D. Holschuh & Alvin J. McKenna, Attorneys at law, 1120 Huntington Bank Bldg., Columbus, Ohio.

• • •

Plaintiffs' Exhibit 157D

[p. 54]

Q Well, let's assume by segregation we mean some sort of State action that caused this to happen, and let's talk first of all, just in purely racially isolated, regardless of how it got that way.

A In Ohio?

Q Let me ask you what you would consider a school to be when you would consider a school to be racially isolated in that context?

A We would consider it to be racially isolated from the standpoint of the State Department of Education when this had resulted from the actions of some legally constituted body which had separated races.

Q So when the State Department uses that term that is what they mean?

A This would be – We only see it through – we do not construe the neighborhood school concept as, or a neighborhood school as one which is racially segregated if we can relate it to the terms of legal factors as having been caused by some legal action. In Ohio segregation from a legal point of view was abolished many, many years ago, somewhere in the prior century, just as at Oberlin College, and on and on. Ohio has not had segregated schools on a legal basis so far as * * *

* * *

PLAINTIFFS' EXHIBIT 161A

———

Motion to adjourn to Monday, June 5, 1933 . . .

MONDAY, JUNE 5, 1933
ADJOURNED MEETING

President Stephens in the chair

MEMBERS ANSWERING ROLL CALL – 7
MEMBERS ABSENT – 0

RESOLVED THAT the Paul Laurence Dunbar School be opened and occupied at the beginning of the next school year, and that the Superintendent be instructed to proceed with the necessary steps in equipping this school for occupancy, and

BE IT FURTHER RESOLVED that the 7th and 8th grades at the Garfield and ——— schools be discontinued, and that attendance at the Paul Lawrence Dunbar School be ——— for all junior high school students of the 7th, 8th, and 9th grade levels in the ———.

PLAINTIFFS' EXHIBIT 161B

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF DAYTON, OHIO

THURSDAY, JUNE 11, 1942
REGULAR MEETING

Due to emergency housing conditions in the city, it will be necessary for the Board of Education to approve certain adjustments in pupil assignments for the coming year. Therefore,

BE IT RESOLVED THAT the Board of Education authorize the Superintendent of Schools to assign the pupils from the eighth grade at Webster and McGuffey Schools to the Kiser High School.

BE IT FURTHER RESOLVED THAT the seventh grade pupils from the Willard and Garfield Schools be assigned to Dunbar High School.

BE IT FURTHER RESOLVED THAT the school children in the De Soto Bass Courts, Grades 1-6, be assigned to the Wogaman School.

The vote was taken on the adoption of the foregoing resolution, with the following result:
Cook, Eberhart, Schenck, Mrs. Wineland, and Wortman, — 5 yeas.

So the President declared the resolution adopted.

PLAINTIFFS' EXHIBIT 162

[LETTERHEAD OF STATE OF OHIO, DEPARTMENT OF EDUCATION, COLUMBUS 43215]

November 17, 1972

Mr. John D. Holschuh
Alexander, Ebinger, Holschuh, Fisher and McAlister
17 South High Street
Columbus, Ohio 43215

Mark Brinkman, et al
vs.
John J. Gilligan, et al

Dear Mr. Holschuh:

The following information was requested by Louis R. Lucas of Dr. Martin W. Essex during his deposition on November 11, 1972 in Dayton:

1) School foundation payments to the Dayton City School District during Fiscal Years 1972 and 1973.

2) Judge William Ammer's decision regarding Bloomfield-Mespo and Farmington charter revocations.

3) State Board of Education resolution regarding Bratenahl Local School District.

4) Federal funds allocated to the Dayton City School District by the State Department of Education.

Please be advised that during Fiscal Year 1972, the Dayton City School District received a total of $9,525,492 through the State Foundation Program. Based upon July estimates of enrollment and staffing levels, the Dayton City School District will receive $11,521,673.84 during Fiscal Year 1973. Actual Fiscal Year 1973 payments to Dayton will not be known until adjustments are made in January, 1973.

Plaintiffs' Exhibit 162

Attached herto are the other items requested.

Sincerely yours,

/s/ G. R. BOWERS
Assistant Superintendent
GRB:j

PLAINTIFFS' EXHIBIT 164

(Portion of Deposition of Ralph Curk)

* * *

[52] Q. In opening a new school was any attempt ever made to open that school with a particular racial composition?

A. You mean to spot the school so that it would be specifically integrated?

Q. Yes.

A. No. As I said before, we will go back to the original set of conditions that determined, and racial did not enter into it, now, I don't know how many time I am going to have to repeat that for you.

Q. I understand that.

A. Excuse me for losing my patience but I am not used to this sort of thing.

Q. I understand that.

What I am trying to get at is in the one instance as opposed to all others, in the Roth instance the procedure apparently was just slightly different. I am not placing value judgment.

A. Now, may I venture an opinion that may kill this one one time for all.

Q. Yes.

A. In all probability it was requested to make sure that it wouldn't be all White. Now, that is just my opinion. I have no way of knowing that.

* * *

[61] A That is right, of the elementary schools and contributing feeder schools to the high school, all right.

Q. Yes, exactly, and insofar as you were involved in that would you make a recommendation, for example, that capacities could be altered, instead of building additional capacities, saying, you know, we could redraw the boundary line this way or in the alternative we could make an optional area hard boundary line?

A. There is only one case that I think we presented as an

Plaintiffs' Exhibit 164

alternative and that was not in high school. That was in elementary situation.

Q. And what was that instance?

A. That was in the case of Garfield and Willard Schools, where we had two, a plan A and a plan B, as I recall it, and one was to add on to those schools the say way we were going to add on to other schools, or to shrink those boundaries and add on to the peripheral schools, which were an integrated situation.

Q. Do you know about what period of time this was?

A. That had to have been in the early '50's.

Q. In other words, sometime between approximately 1950 and '55?

A. Yes, uh-huh.

° ° °

[91] Q. Well, let me ask it this way: in 1972-'73 if you were consulted and asked to investigate a situation and found that the reason for the optional areas creation was no longer there and there was no other reason would you recommend that a strict attendance boundary be created?

A. Or at least — there again it would be difficult to give you a positive answer, but at least maybe part of the area could be, the option removed.

Q. And you would only maintain that part of the option?

A. Depending upon the circumstances, yes.

Q. And you would only maintain that part of the option for which there was still a reason to maintain it?

A. That is right, yes.

Q. Okay. Were you aware of the existence of an option between Carlson and Highview?

A. Carlson and Highview, no, I wasn't aware of that.

Q. In 1962 were you aware of the reason why the Gardendale-Westwood option was increased?

A. Gardendale and Westwood, well, originally Gardendale was to relieve Westwood. ° ° °

° ° °

DEFENDANTS' EXHIBIT B

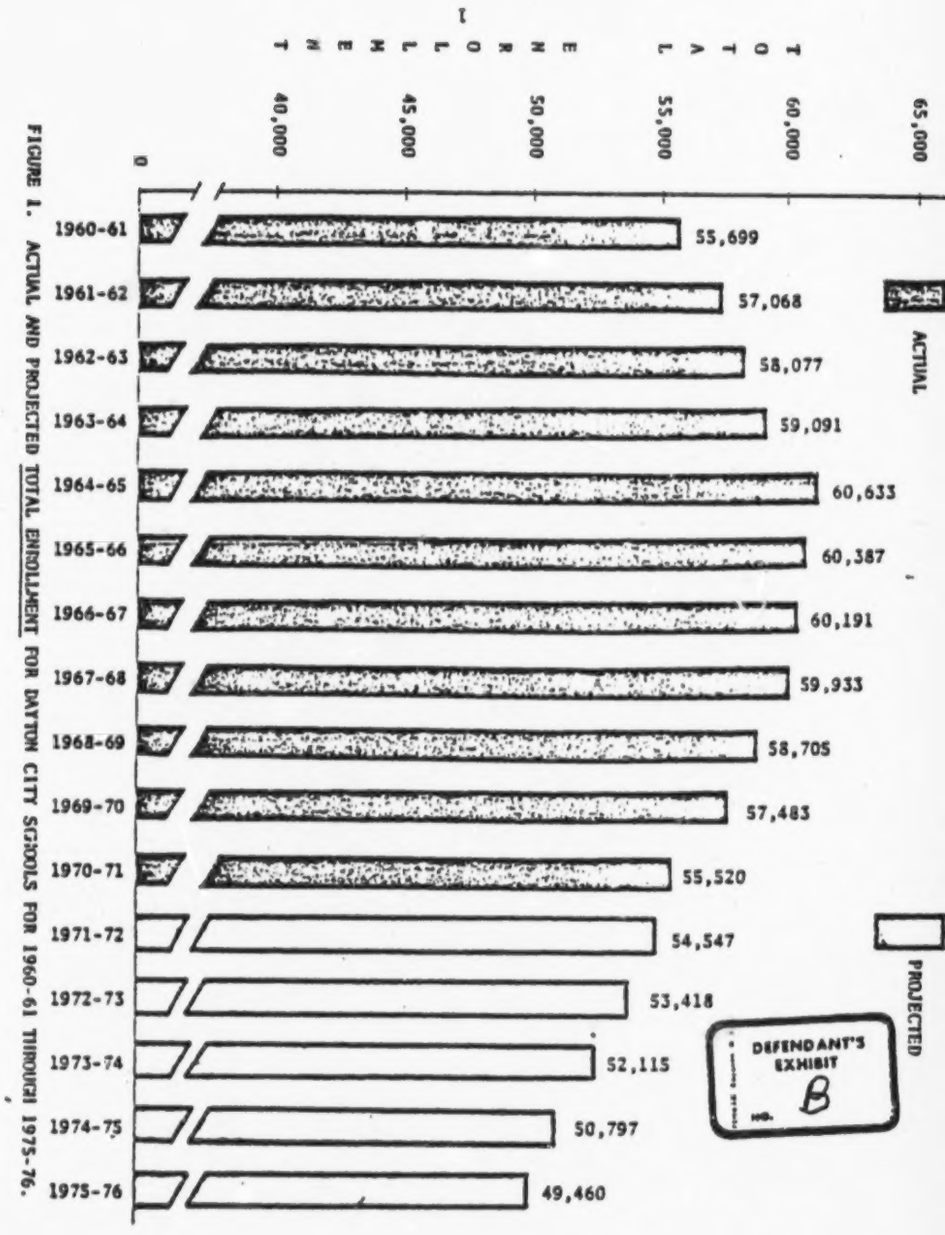

FIGURE 1. ACTUAL AND PROJECTED TOTAL ENROLLMENT FOR DAYTON CITY SCHOOLS FOR 1960-61 THROUGH 1975-76.

266
EX

DEFENDANTS' EXHIBIT D

THURSDAY, AUGUST 25, 1966 – REGULAR MEETING

The following school transportation policy as prepared by William Goff, Director of Pupil Personnel Services, was recommended for approval by Robert B. French, Superintendent of Schools:

DAYTON CITY SCHOOL DISTRICT
SCHOOL TRANSPORTATION POLICY

I. Elementary School Pupils (Grades K-8)

A. Any elementary grade student (except kindergarten) whose residence is more than 1.2 miles radial distance from his school of attendance will be transported to that school from designated pick-up points.

1. Such transportation *will be* provided when the school of attendance is less than *thirty (30) minutes direct travel time* by school bus from the designated public school collection point.
2. Upon the recommendation of the Superintendent of Schools and approval by the Board of Education, transportation for elementary pupils *may* be provided with the 1.2 mile radius distance where high hazard conditions exist and the safety of the student is endangered.
3. Transportation *may* be provided for kindergarten students where the area of residence is being served and when room on the bus is available.

II. High School Pupils (Grades 9-12)

A. Transportation *will be* provided for high school pupils whose residence is more than two (2) miles radial distance from the school of attendance provided further that:

Plaintiffs' Exhibit D

1. The residence of the pupil is more than 1.2 miles direct travel distance to the nearest city public transportation line, AND
2. the travel time by city public transportation is more than forty-five (45) minutes to the designated school of attendance AND
3. the public school collection point is within thirty (30) minutes direct travel time by school bus.

B. Upon the recommendation of the Superintendent of Schools and approval by the Board of Education transportation *may be* provided for high school pupils to the designated school of attendance in the neighborhood or parish district within the two-mile radial distance where unusual conditions of hazard and safety exist.

III. Crippled Pupils

Transportation will be provided to the school of attendance for all children who are so crippled that they are unable to walk to and from school.

August 25, 1966

It was moved by Mr. Farrier, seconded by Mr. Lucas, that the above transporation policy be approved as recommended.

YEAS: Members Farrier, Lucas, Martin, Murr, Shellabarger, and Kline – 6
NAYS: None

This is a certified true copy of an entry in the Minutes of the August 25, 1966, meeting of the Board of Education, Dayton City School District, Dayton, Ohio.

.....
HAROLD L. HOWARD,
Clerk-Treasurer

Plaintiffs' Exhibit D

THURSDAY – AUGUST 21, 1969 – REGULAR MEETING

[AMENDMENT
TO SCHOOL TRANSPORTATION POLICY]

That Section 1-A of the School Transportation Policy be amended to read as follows:

Any elementary grade student (except kindergarten) whose residence is more than 1.5 miles direct travel distance from his school of attendance will be transported to that school from designated pick-up points.

It was moved by Rev. Price, seconded by Mr. MARTIN, that the above amendment to the School Transportation Policy be adopted as recommended by the Supt. of Schools.

YEAS: Lucas, Martin, Price, Shellabarger, and Levy – 5
NAYS: None

The motion was declared approved.

This is a certified true copy of an Amendment adopted by the Dayton Board of Education on August 21, 1969.

/s/ HAROLD L. HOWARD
Clerk-Treasurer

TRANSPORTATION PROGRAM

Year		1966-67	1967-68	1968-69	1969-70	1970-71	1971-72
Total	Number of buses operated daily for regular students average for AM & PM	47	60	56	50	35	31, 13 for FOE 2nd sem.
	No. of St. John Buses - average AM & PM	47	60	56	50	22	18
	No. of Board owned buses	0	0	0	0	13	13
Total	No. of Students Transported	4,601	5,333	5,948	6,070	5,492	5,404
	No. of Public Students Transported	3,110	3,709	4,572	4,683	4,134 (1,281)*	3,399 (1,347)*
	No. of Non-Public Students Transported	1,390	3,499	1,228	1,168	956 (479)*	820 (435)*
	No. of Freedom of Enrollment Students Transported (second semester)	0	0	0	0	0	530

* Denotes No. of Students Transported on Board Buses

270-Ex.

DEFENDANTS' EXHIBIT E

271-Ex.

DEFENDANTS' EXHIBIT N

THURSDAY – DECEMBER 10, 1959 –
REGULAR MEETING

Motion was made by Mr. Wortman, seconded by Dr. Light, that the 2 foregoing resolutions be adopted.

The vote was taken upon the adoption of the resolutions, with the following result:

Broaddus, Farrier, Light, Murr, Mrs. Shellabarger, Wortman, and Kline – 7 Yeas

Resolutions adopted.

Remarks were made by Mrs. Miley Williamson, executive secretary of the Dayton branch of the National Association for the Advancement of Colored People (NAACP), concerning the selection of the site for the proposed new Dunbar High School, withdrawing previous objections.

This is a certified true copy of an entry in the Minutes of the December 10, 1959, meeting of the Board of Education, Dayton

DEFENDANTS' EXHIBIT AB

[FREEDOM OF ENROLLMENT POLICY]

THURSDAY – MAY 29, 1969 – REGULAR MEETING

Rev. Price, presented the following statement to the Board:

This Board is committed to the achievement of quality integrated education for all pupils in the Dayton schools. Within the past month we have requested assistance from the State and Federal offices of Equal Educational Opportunity to explore every feasible means of moving toward this goal. Many individuals have expressed their desire to provide for children, learning opportunities that at present may be limited by housing patterns that may prevail in our urban centers. They may desire to enroll children in a school offering a course or student body composition not available within the attendance area of residence.

The need for additional classrooms exists in many areas of the city. Limited space within certain classrooms is available from time to time. Thus, voluntary transfers may assist in better utilization of all buildings.

For these reasons a policy statement on freedom of enrollment is proposed to make voluntary transfers available to all families within the school district.

Freedom of Enrollment Policy

A. **Transfer Within District**

The parent of a pupil in good standing enrolled in the Dayton Public School District may request assignment of the pupil to any school building within the district where space may be available to accomodate him. Such requests will be granted according to the following priorities:

Plaintiffs' Exhibit AB

1. Students residing within the attendance area of a school building shall have *first* priority to assignment to that building.
2. Students meeting the requirements for a course available only in the particular building shall have *second* priority for attendance in that building.
3. A student desiring enrollment in any building for whatever reason shall have *third* priority in that building providing his enrollment will contribute to improved racial balance in that building.
4. Transfer to another school within the city may be made at the beginning of a semester.
5. A permit to attend a school outside the attendance area of resident is valid until the end of the school year for which it is issued. It is *renewable on a year-to-year* basis depending upon availability of space in the receiving school. A student requesting renewed assignment shall have priority over new transfer requests.
6. Students desiring return to their home school district may do so at the end of a semester, unless an emergency situation arises, and will not be eligible for further free enrollment transfer.
7. An application for transfer may be obtained from and submitted to the principal of the home school district. All requests for transfer shall be forwarded by the principal to the Department of Pupil Personnel for action.
8. Transportation will be the responsibility of the parent.

B. **Student Exchanges Within the City**

1. Any two pupils, or group of pupils, attending schools within the district may voluntarily exchange places for a semester or a year if such exchange will improve the racial balance in the receiving schools.

Plaintiffs' Exhibit AB

2. Procedures shall be the same as for transfers as enumerated above.

Following completion of discussion during which time members of the audience, both proponents and opponents of the proposed policy statement, were heard; it was moved by Rev. Price, seconded by Dr. Carrell, that the Board endorse the Freedom of Enrollment Policy and that the Superintendent of Schools be authorized to make such policy known immediately so that enrollments may be made for the 1969/70 school year.

YEAS: Carrell, Martin, Price, Seaman, Shellabarger, and Levy – 6

NAYS: None

The motion was declared approved.

This is a certified true copy of an entry in the Minutes of the May 29, 1969, meeting of the Board of Education, Dayton City School District, Dayton, Ohio.

HAROLD L. HOWARD, Clerk-Treasurer
/s/ HAROLD L. HOWARD

DEFENDANT'S EXHIBIT NO. AI(a)

Staff and Pupil Data
for Selected Years

	1950-51						1951-52						1954-55						1956-57			
Elem.	Staff	Black	%	Pupils	Black	%	Staff	Black	%	Pupils	Black	%	Staff	Black	%	Pupils	Black	%	Staff	Black	%	No Pupil Data
Jane Addams				405	123	30.4				443	130	29.3										
Allen				475	46	9.7				494	40	8.1										
Belle Haven					NA						NA					NA						
Belmont El.				1099	0	0				1147	0	0										
Brown				729	0	0				824	0	0							34.5	.5	1.4	
Carlson					NA						NA					NA						
Central				638	245	38.4				687	233	33.9							22.0	1	4.5	
Cleveland				701	0	0				711	0	0										
Cornell Hts.					NA						NA											
Drexel				742	189	25.5				737	213	28.9										
Eastmont					NA						NA					NA						
Edison				432	186	43.1				463	199	43.0	26	3	11.5				25.0	4	16.0	
Emerson				1158	24	2.1				1218	22	1.8	51	1	2.0				49.0	1	2.0	
Fairport					NA						NA											
Fairview El.				834	0	0				905	0	0										
Ft. McKinley				489	0	0				364	0	0										
Franklin				516	0	0				504	0	0										
Garfield	22	22	100	685	685	100	25	25	100	700	700	100	18	18	100				20.0	2WPT 20		Less than 100%
Gardendale					NA						NA					NA						
Gettysburg				?	?	?				?	?	?										
Grant				365	0	0				400	0	0							3.0	1	3.2	
Greene				358	28	7.8				401	26	6.5							22.0	1	4.5	
Hawthorne				*275	0	0				278	0	0										
Hickorydale					NA						NA					NA						
Highview					NA					?	?	?	21	1	4.8				28.0	5	17.9	
Huffman				785	0	0.0				774	1	0.1										
Irving				960	262	27.3				669	312	46.6							33.0	4	12.1	
Jackson El.				785	206	26.2				790	284	35.9	28	3	10.7				33.0	7.5	22.7	
Jackson Pr.					NA						NA											
Jefferson El.				953	0	0				946	0	0										
Jefferson Pr.					NA						NA											
Kemp				271	0	0				276	0	0										
Lewton				191	0	0				196	0	0										
Lincoln				676	0	0				648	0	0										
Longfellow				494	4	0.8				499	2	0.4										
Loos				596	0	0				594	0	0										
MacFarlane					NA						NA											
Horace Mann					NA						NA											
McGuffey				486	0	0				524	0	0										
McKinley					NA						NA		14	1	7.1					1		
McNary					NA						NA											
Meadowdale El.					NA						NA											
Miami Chapel					NA						NA		35	29	82.9				36.0	3W33 4WPT		Less than 91%
Patterson El.				478	0	0				456	0	0										
Patterson & Pk. El.				412	0	0				462	0	0										
Residence Pk. Pr.					NA						NA											
Puskin				600	2	0.3				596	2	0.3										
Shiloh				286	0	0				303	0	0										
Rhoda Hill					NA						NA											
Louise Troy					NA						NA											
Valerie					NA						NA											
Van Cleve				506	0	0				483	0	0	20	1	5.0				22.0	1	4.5	
Washington				653	124	19.0				706	128	18.1							21.0	2	9.6	
Weaver				648	453	69.9	23	1	4.3	630	477	75.6	30	2	13.3				36.0	13	36.1	
Webster				706	0	0				718	0	0										
Westwood				960	1	0.1				984	1	0										
Willard	28	28	100	816	816	100	29	29	100	773	773	100	22	22	100.0				19.0	19	0	
Wheeler				715	132	22.5				538	161	29.9	20	1	5.0				27.0	5	18.5	
Wogaman	33	33	100	1107	1107	100	35	35	100	1111	1111	100	33	33	100.0				42.0	1WPT 12		Less than 100%
Orville Wright					NA						NA								24.0	1	4.2	
High																						
Belmont					NA						NA											
Dunbar	52	52	100	1102	1102	100	53	53	100	1018	1018	100	48	48	100.0				49	49.0		Less than 100%
Fairview				811	0	0				856	0	0							52.0	1	1.9	
Kiser				910	7	0.8				923	5	0.5										
Meadowdale					NA						NA											
Patterson Co-op				634	5	0.8				708	8	1.1										
Thomas Jefferson				2306	642	27.8				2407	750	31.2							88.0	2	2.3	
Roth					NA						NA											
Stivers				1129	9	0.8				1127	13	1.2							58.0	1	1.7	
Colonel White				899	0	0				967	1	.1										
Wilbur Wright				1[illegible]	44	1.[illegible]				1340	29	2.2							72.0	1	1.9	
Special																						
[illegible]													105	5	4.8							
[illegible]																			6.0	1	16.7	
Coleman				140	45	32.4				101	41	40.6							13.0	1	7.7	
Kennedy				89	3	3.4				92	3	3.3										

Division of Research
Management Services Dept.

275-Ex.
DEFENDANTS' EXHIBIT AI(b)

Staff and Pupil Data for Selected Years

	1958-59					1963-64 (Estimated)					1968-69					1969-70				
	Staff	Black	%	Pupils	Black	%	Staff	Black	%	Pupils	Black	%	Staff	Black	%	Pupils	Black	%	Staff	Black	%
Elem.																				
Jane Addams							20	2	10.0	600	250	41.7	26	6	23.1				73.8	27	7	25.9		78.7
Allen							18	0	0.0	574	4	0.6	25	1	4.0				0.1	27	3	11.1		0.1
Belle Haven							37	0	0.0	1180	0	0.0	45	2	4.4				5.0	50	6	12.0		5.7
Belmont El.							26	0	0.0	794		0.0	27	1	3.7				0.0	27	2	7.4		0.0
Brown							39	0	0.0	1177	6	0.5	45	1	2.2				0.6	44	2	4.5		0.8
Carlson	9	9	100				10	10	100.0	244	234	95.9	25	21	84.0				99.0	27	7	74.1		99.7
Central	22	4	18.2				17.5	4	22.9	350	175	50.0	NA						NA	NA				NA
Cleveland							36	0	0.0	1180	0	0.0	45	1	2.2				0.0	47	3	6.4		0.1
Cornell Elem.							30.5	0	0.0	890	0	0.0	34	3	8.8				44.2	39	8	20.5		59.1
Drexel							23	0	0.0	700	25	3.5	26	2	7.7				5.7	31	8	25.8		4.1
Eastmont							28	1	3.6	950	0	0.0	37	1	2.7				0.0	33	4	12.1		0.0
Edison	26	5	19.2				26	6	23.1	800	640	80.0	18	16	88.9				97.3	25	15	60.0		94.3
Emerson							40	2	5.0	1000	0	0.0	43	4	9.3				6.8	42	6	14.3		13.6
Fairport							26	0	0.0	780	0	0.0	34	2	5.9				0.1	33	4	12.1		4.6
Fairview El.							28	0	0.0	667	7	1.0	34	2	5.9				1.7	32	3	9.4		3.7
Ft. McKinley							17	0	0.0	510	0	0.0	18	1	5.6				0.0	21	3	14.3		2.5
Franklin							23	0	0.0	691	0	0.0	37	1	2.7				0.0	37	2	5.4		0.0
Garfield	21	21	100					NA			NA			NA					NA		NA			NA
Gardendale							8	1	12.5	176	14	7.9	11	3	27.3				28.5	14	2	14.3		43.3
Gettysburg							19	1	5.2	630	0	0.0	26	1	3.9				5.2	21	4	16.0		6.6
Grant							31	1	3.2	917	0	0.0	32	2	6.3				0.1	30	2	6.7		0.9
Greene	23	5	21.7				23	11	47.8	715	640	89.5	26	21	80.8				96.8	31	17	54.8		97.5
Hawthorne							10	0	0.0	316	0	0.0	12	0	0.0				0.0	13	1	7.7		0.0
Hickorydale							18	0	0.0	565	0	0.0	22	0	0.0				6.6	25	3	12.0		16.3
Highview	28	5	17.9				30	16	53.3	807	662	82.0	36	21	58.3				97.0	34	17	50.0		98.2
Huffman							35	5	14.3	834	8	0.9	41	3	7.3				0.0	44	3	6.8		1.4
Irving	36	10	27.8				34	17	50.0	1035	1000	96.6	35	26	74.3				99.0	35	26	74.3		100.0
Jackson El.	33	9	27.3				31	23	74.2	1147	1130	98.5	39	33	84.6				99.1	41	32	78.0		99.5
Jackson Pr.							18	11	61.1	537	517	96.3	23	19	82.6				98.8	22	12	54.5		99.2
Jefferson El.							38	0	0.0	1284	16	1.2	44	8	18.2				60.1	36	14	38.9		80.3
Jefferson Pr.							—	—	—	—	—	—	NA	33	9	39.1			57.1	28	11	39.3		72.0
Kemo							24	0	0.0	725	0	0.0	28	0	0.0				0.0	27	2	7.4		0.0
Lawton							20	0	0.0	600	0	0.0	22	0	0.0				0.0	24	2	8.3		0.0
Lincoln							33	1	3.0	1145	0	0.0	43	1	2.3				0.0	43	4	9.5		0.2
Longfellow							28	1	3.6	850	50	5.9	40	7	17.5				42.3	45	9	20.0		50.2
Loos							27	0	0.0	785	15	1.9	29	1	3.5				4.6	30	4	13.3		5.0
MacFarlane							43	43	100.0	1229	1225	99.7	49	48	98.0				99.9	48	41	85.4		99.9
Horace Mann							15	0	0.0	435	0	0.0	14	0	0.0				0.2	14	2	14.3		7.0
McGuffey							34	1	2.9	925	0	0.0	36	1	2.8				14.4	37	6	16.2		18.9
McKinley																								
McNary								NA					NA	22	19	86.4			99.4	23	15	65.2		98.8
Meadowdale							29	0	0.0	930	0	0.0	31	1	3.2				8.0	29	4	13.8		12.8
Miami Chapel	28	25	89.3				29	27	93.1	793	790	99.6	33	29	87.9				99.9	37	28	75.7		99.6
Patterson El.							22	1	4.5	650	0	0.0	26	1	3.9				0.0	25	1	4.0		0.0
Residence Pk. El.							35	2	5.7	1111	830	80.0	34	23	67.7				98.8	35	17	48.6		99.2
Residence Pk. Pr.								NA				NA	16	11	68.8				99.3	15	10	66.7		99.5
Ruskin							38	1	2.6	1171	1	0.0	39	1	2.6				7.0	38	2	5.3		4.3
Shiloh							17	0	0.0	490	12	2.4	19	0	0.0				0.1	27	1	3.7		6.3
Shoup Mill							10	0	0.0	318	3	0.9	15	1	6.7				7.1	14	2	14.3		13.4
Louise Troy	25	25	100.0				28	22	95.7	781	780	99.9	20	20	100.0				100.0	29	25	86.2		99.7
Valerie								NA				NA	19	1	5.3				7.5	23	5	21.7		17.4
Van Cleve							25	2	8.0	770	7	0.9	34	1	2.9				1.1	32	5	15.6		1.7
Washington							21	2	9.5	650	150	23.0	27	4	14.8				19.4	27	6	22.2		16.6
Weaver	38	19	50.0				40	31	77.5	1264	1245	98.5	48	43	89.6				99.9	49	38	77.6		100.0
Webster							18	1	5.6	931	1	0.1	28	0	0.0				0.0	29	3	10.3		0.5
Westwood	45	1	2.2				64	20	31.3	1000	1800	94.7	64	42	65.6				99.4	60	24	36.7		99.5
Willard	22							NA			NA	NA							NA					NA
Whittier	32	11	34.4				32	14	43.8	925	884	95.6	33	21	63.6				99.2	31	17	54.8		99.3
Wogaman	39	39	100.0				37	37	100.0	1100	1100	100	41	40	97.5				100.0	42	33	78.6		100.0
Orville Wright							25	1	4.0	750	0	0.0	30	1	3.3				0.0	32	4	12.5		0.9
High																								
Belmont							70	1	1.4	1768	0	0.0	87	5	5.8				0.1	81	8	9.9		0.5
Dunbar	42	42	100.0				45	42	93.3	1130	1075	92.7	70	62	88.6				99.3	65	53	81.5		99.4
Fairview							53	1	1.9	1392	12	0.9	77	5	6.5				5.2	67	6	9.0		2.3
Kiser							38	2	5.3	740	20	2.7	46	2	4.4				1.8	43	3	7.0		5.4
Meadowdale							44	2	4.5	1154	1	0.0	79	4	5.1				1.1	75	5	6.7		1.4
Patterson Co-op							49	1	2.0	1020	19	1.9	95	3	3.5				18.3	95	6	6.3		22.2
Roosevelt	105	10	9.5				92	22	23.9	1325	1250	94.4	104	60	65.4				100.0	120	64	53.2		99.8
Roth							46	11	23.9	1120	600	53.6	69	50	72.5				92.3	63	19	30.1		94.9
Stivers							55	4	7.2	1150	30	2.6	51	3	5.7				6.6	58	4	6.9		1.9
Colonel White							68	4	5.9	1693	20	1.1	85	5	5.9				19.3	81	11	13.6		48.9
Wilbur Wright							53	3	5.7	1334	45	3.3	72	5	7.0				3.5	64	5	7.8		1.4
Special																								
Technical																								
Practical Nursing																								
Clark																								
Gorman							9	1	11.1	102	16	15.9	14	0	0.0				21.1	18	2	12.2		7.6
Kennedy							18	5	27.8	144	20	13.8	23	6	26.1					20	5	25.0		

Defendants' Exhibit A(b)

276-Ex.

277-Ex.

DEFENDANTS' EXHIBIT AI(c)

Selected Summary for Staff and Pupil Data

Identification of Schools By Faculty Assignment

School	Year	% Black Staff	% Black Enrollment
Jane Adams	1951-52	0	29.3
	1963-64	23.1	73.8
Cornell Heights	1968-69	8.8	44.2
	1969-70	20.5	59.1
Edison	1951-52	0	43.1
	1963-64	23.1	80.0
Irving	1950-51	0	27.3
	1951-52	0	46.6
Jackson Elementary	1950-51	0	26.2
	1951-52	0	35.9
Jefferson Primary	1968-69	39.1	57.1
	1969-70	39.3	72.0
	1972-73	32.3	93.5
Longfellow	1968-69	17.5	42.3
	1969-70	20.0	50.2
Residence Park Primary	1963-64	5.7	80.0
Weaver	1951-52	4.0	67.6
Westwood	1963-64	31.3	94.7
Whittier	1951-52	0	29.9
Roosevelt	1963-64	26.8	94.6

278-Ex.

DEFENDANTS' EXHIBIT AJ

Number and Percentage of Racial Composition
of Certified Personnel
Dayton City School District

	1968-69			1969-70			1970-71			1971-72			1972-73		
	W	B	% Black	W	B	% Black	W	B	% Black	W	B	% Black	W	B	% Black
Administration															
Central Office + Service Bldg.	78	19	19.4	93	32	25.4	100	37	27.0	98.5	43	30.4	99	38.5	28.0
Principals and Asst's	84	27	24.3	82	35	29.9	76	35	31.5	67	39	36.8	72	45	38.5
Total	162	46	22.1	175	67	27.6	176	72	29.0	165.5	82	33.1	171	83.5	32.9
Instructional															
Elementary	1232	534	30.2	1253	567	31.2	1100	583	34.6	1072.1	560.1	34.3	1037.6	582.5	36.0
High	615	212	25.6	597	203	25.4	599	223	27.1	516.0	228.5	30.6	525.5	254.0	32.6
Total	1847	746	28.8	1850	770	29.4	1699	806	32.2	1588.1	788.6	33.2	1563.1	836.5	34.9
Extra Curricular															
Coaches	102	26	20.3	102	28	21.6	109	32	22.7	107	52	32.7	Not Available		
Support Services															
Counselors	63	25	28.4	69	40	36.7	68.5	31	31.2	63.5	36	36.0	59	42	41.5

Compiled by Staff Development Department

DEFENDANTS' EXHIBIT AK

ADMINISTRATIVE STAFF
BY POSITION, RACE, AND SCHOOL YEAR
FOR DAYTON CITY SCHOOLS

	1969-70		1970-71		1971-72	
	White	Black	White	Black	White	Black
Superintendent	1		1		1	
Clerk-Treasurer	1		1		1	
Administrative Assistant		1		1		
Assistant Superintendent	3	1	3	1	3	1
Executive Director	1	1	1	1	3	
Director	5		5		5	1
Associate Director	4	2	4	2	3	2
Supervisor and Assistant Supervisor (Certificated)	20	5	30	4	19	4
Supervisor and Assistant Supervisor (Non-certified)	13	3	11	4	13	3
Coordinator	7	1	4	1	9	3
Program Director and Coordinator (Spec. Asst.)	12	11 (Oriental) 1	11	14	2	16
Resource Teacher	6	5	11	7	17	9
Psychologist	15	1	15	1	14	1
Child Accountant	2		1		1	
Other	1				7.5	3 (Oriental) 1
Supervising Principals or Facilitators	2	1	2	1		
TOTAL Central Office and Service Building	93	32	100	37	98.5	43
Percentages	74.6%	25.4%	73.0%	27.0%	69.6%	30.4%
Principals	51	18	51	18	47	22
Assistant Principals	31	17	25	17	20	17
TOTAL Principals and Assistant Principals	82	35	76	35	67	39
Percentages	70.1%	29.9%	68.5%	31.5%	63.2%	36.8%
TOTAL STAFF	175	67	176	72	165.5	82
Percentages	72.4%	27.6%	71.0%	29.0%	66.9%	33.1%

DEFENDANTS' EXHIBIT AL

Summary of Racial Composition of Staff
by Composition of Student Body
Dayton City Schools

	1968-69	1969-70	1970-71	1971-72	1972-73
White principal with no assistant in schools 50% or more black student population	6	6	6	5	5
Negro principal with no assistant in schools 50% or more white student population	0	2	2	5	5
Integrated administrative staff in schools 50% or more black student population	7	13	11	12	13
Integrated administrative staff in schools 50% or more white student population	4	6	8	14	15
Administrative staff same race as predominant racial composition of student population	52	42	42	33	30

Compiled by: Division of Research
Management Services Department

DEFENDANTS' EXHIBIT AM

RACIAL COMPOSITION OF PRINCIPALS AND ASSISTANT PRINCIPALS
FOR 1969-70, 1970-71, AND 1971-72

	1969-70					1970-71					1971-72				
	Principal		Asst. Prin.		Int.	Principal		Asst. Prin.		Int.	Principal		Asst. Prin.		Int.
Elem. Schools	White	Black	White	Black	Codes	White	Black	White	Black	Codes	White	Black	White	Black	Codes
Jane Addams	1				1	1				1	1				1
Allen	1					1					1				
Belle Haven	1					1						1	1		*2
Belmont Elem.	1					1					1				
Brown	1		1			1		1			1			1	*
Carlson		1					1					1			
Cleveland	1		1				1	1		*2		1	1		*2
Cornell Hts.	1			1	*1	1			1	*1	1		(1B,2W Coord.)		*1
Drexel	1					1					1				
Eastmont	1		1			1		1			1				
Edison		1					1					1			
Emerson	1		1			1		1			1		1		
Fairport	1		1			1		1				1	1		*2
Fairview El.	1		1			1					1			1	*
Ft. McKinley	1					1					1				
Franklin		1	1		*2		1	1		*2		1			2
Gardendale	1					1					1				1
Gettysburg	1					1					1				
U. S. Grant	1					1					1				
G. A. Greene	1				1	1				1		1			
Hawthorne	1					1					1				
Hickorydale	1					1					1				
Highview	1			1	*1	1				1	1				1
Huffman	1		1			1		1			1		1		
Irving	1			1	*1	1			1	*1	1				1
Jackson Elem.	1				1	1			1	*1	1			1	*1
Jackson Prim.		1					1					1			
Jefferson Elem.		1	1		*	1				1	1			1	*1
Jefferson Prim.		1					1					1			
Kemp	1					1					1				
Lewton		1			2		1			2		1			2
Lincoln	1		1			1		1			1			1	*
Longfellow	1			1	*1	1			1	*1	1		(1B,2W Coord.)		*1
Loos	1					1					1				
MacFarlane		1	1		*		1	1		*		1	(2B,1W Coord.)		*

	1969-70					1970-71					1971-72				
	Principal		Asst. Prin.		Int.	Principal		Asst. Prin.		Int.	Principal		Asst. Prin.		Int.
Elem. Schools	White	Black	White	Black	Codes	White	Black	White	Black	Codes	White	Black	White	Black	Codes
Horace Mann		1			2		1			2		1			2
McGuffey	1		1			1		1			1		1		
McNary		1					1				1				1
Meadowdale El.	1					1					1				
Miami Chapel		1					1					1			
Patterson Elem.	1					1					1				
Residence Pk.El.	1				1	1				1		1	1		*
Residence Pk.Pr.	1				1	1				1	1				1
Ruskin	1		1			1		1			1		1		
Shiloh	1					1						1			2
Shoup Mill	1					1					1				
Louise Troy		1					1					1			
Valerie	1					1					1				
Van Cleve	1		1			1		1			1				
Washington	1					1						1			2
Weaver		1	1		*		1	1		*	1			1	*1
Webster	1					1					1				
Westwood		1	1	2	*		1		2			1		1	
Whittier	1			1	*1	1			1	*1	1		(2B,1W Coord.)		*1
Kogaman		1	1		*		1	1		*		1	1		*
Orville Wright	1		1			1					1		(1B,2W Coord.)		*
Gorman	1					1					1				
Kennedy	1					1					1				
	43	15	18	7		43	15	14	7		39	19	9	7	
High Schools															
Belmont	1		2	1	*	1		2	1	*	1		1	1	*
Dunbar		1	1	1	*		1	1	1	*		1	1	1	*
Fairview	1		2			1		1	1	*	1		1	1	*
Kiser	1		1			1		1			1		1		
Meadowdale	1		1	1	*	1		1	1	*	1		1	1	*
Patterson Coop	1		1	1	*	1		1	1	*	1		1	1	*
Roosevelt		1	1	2	*		1		1			1	1	1	*
Roth		1	1	2	*		1	1	1	*		1	1	1	*
Stivers	1		1			1		1			1		1	1	*
Col. White	1		1	1	*	1		1	2	*	1		1	1	*
Wilbur Wright	1		1	1	*	1		1	1	*	1		1	1	*
	8	3	13	10		8	3	11	10		8	3	11	10	

Total for Integration Codes (Int. Codes)			
* Integrated administrative staff	19	18	26
(1) White Principal in black school	10	11	12
(2) Black Principal in white school	3	4	8

DEFENDANTS' EXHIBIT AN

NUMBER OF TEACHERS BY RACE AND % OF NEGRO TEACHERS

	Elementary Schools	1968-69 White	1968-69 Negro	1968-69 % Negro	1969-70 White	1969-70 Negro	1969-70 % Negro
1	Jane Addams *	20	6	23.1%	20	7	25.9%
2	Allen	24	1	4.0	24	3	11.1
3	Belle Haven	43	2	4.4	44	6	12.0
4	Belmont Elem.	26	1	3.7	25	2	7.4
5	Brown	44	1	2.2	42	2	4.5
6	Carlson *	4	21	84.0	7	20	74.1
7	Cleveland	44	1	2.2	44	3	6.4
8	Cornell Heights 73 *	31	3	8.8	31	8	20.5
9	Drexel	24	2	7.7	23	8	25.8
10	Eastmont	36	1	2.7	29	4	12.1
11	Edison *	2	16	88.9	10	15	60.0
12	Emerson	39	4	9.3	36	6	14.3
13	Fairport	32	2	5.9	29	4	12.1
14	Fairview Elem.	32	2	5.9	29	3	9.4
15	Fort McKinley	17	1	5.6	18	3	14.3
16	Franklin	36	1	2.7	35	2	5.4
17	Cardendale (72-73 *)	8	3	27.3	12	2	14.3
18	Gettysburg	25	1	3.9	21	4	16.0
19	U. S. Grant	30	2	6.3	28	2	6.7
20	Grace A. Greene *	5	21	80.8	14	17	54.8
21	Hawthorne	12	0	0.0	12	1	7.7
22	Hickorydale	22	0	0.0	22	3	12.0
23	Highview *	15	21	58.3	17	17	50.0
24	Huffman	38	3	7.3	41	3	6.8
25	Irving *	9	26	74.3	9	26	74.3
26	Jackson Elem. *	6	33	84.6	9	32	78.0
27	Jackson Primary *	4	19	82.6	10	12	54.5
28	Jefferson Elem *	36	8	18.2	22	14	38.9
29	Jefferson Primary *	14	9	39.1	17	11	39.3
30	Kemp	28	0	0.0	25	2	7.4
31	Lawton	22	0	0.0	22	2	8.3
32	Lincoln	42	1	2.3	38	4	9.5
33	Longfellow	33	7	17.5	36	9	20.0
34	Loos	28	1	3.5	26	4	13.3
35	MacFarlane *	1	48	98.0	7	41	85.4
36	Horace Mann	14	0	0.0	12	2	14.3
37	McGuffey	35	1	2.8	31	6	16.2
38	McKary *	3	19	86.4	8	15	65.2
39	Meadowdale Elem.	30	1	3.2	25	4	13.8
40	Miami Chapel *	4	29	87.9	9	28	75.7
41	Patterson Elem	25	1	3.9	24	1	4.0
42	Residence Park Elem. *	11	23	67.7	18	17	48.6
43	Residence Park Primary *	5	11	68.8	5	10	66.7
44	Ruskin	38	1	2.6	36	2	5.3
45	Shiloh	19	0	0.0	26	1	3.7
46	Shoup Mill	14	1	6.7	12	2	14.3
47	Louise Troy *	0	20	100.0	4	25	86.2
48	Valerie	18	1	5.3	18	5	21.7
49	Van Cleve	33	1	2.9	27	5	15.6
50	Washington	23	4	14.8	21	6	22.2
51	Weaver &	5	43	89.6	11	38	77.6
52	Webster	28	0	0.0	26	3	10.3
53	Westwood *	22	42	65.6	26	34	56.7
54	Whittier *	12	21	63.6	14	17	54.8
55	Wogaman *	1	40	97.6	9	33	78.6
56	Orville Wright	29	1	3.3	28	4	12.5
57	Gorman	14	0	0.0	14	2	12.5
58	Kennedy	17	6	26.1	15	5	25.0
	Total (Elem.)	1,232	534	30.2%	1,253	567	31.2%
	Full-time instructional staff (Elem.)				Full-time instructional staff (Elem.		

NUMBER OF TEACHERS BY RACE AND % OF NEGRO TEACHERS

	High Schools	1968-69 White	1968-69 Negro	1968-69 % Negro	1969-70 White	1969-70 Negro	1969-70 % Negro
1	Belmont	82	5	5.8	73	8	9.9
2	Dunbar *	8	62	88.6	12	53	81.5
3	Fairview	72	5	6.5	61	6	9.0
4	Kiser	44	2	4.4	40	3	7.0
5	Meadowdale	75	4	5.1	70	5	6.7
6	Patterson Co-op	82	3	3.5	89	6	6.3
7	Roosevelt *	36	68	65.4	44	64	59.3
8	Roth *	19	50	72.5	25	38	60.3
9	Stivers	50	3	5.7	54	4	6.9
10	Col. White	80	5	5.9	70	11	13.6
11	Wilbur Wright	67	5	7.0	59	5	7.8
	Total (High)	615	212	25.6%	597	203	25.4%
	Full-time instructional staff (H.S.)				Full-time instructional staff (H.S.)		
	Total (Elem. & High)	1847	766	28.8%	1850	770	29.4%
	Full-time instructional staff (Elem. & H.S.)				Full-time instructional staff (Elem. & H.S.)		

* Denotes schools with 75% or more black student enrollment.

Defendants' Exhibit AN

RACIAL COMPOSITION OF SCHOOLS
FOR 1970-71, 1971-72 AND 1972-73

		1970-71			1971-72			1972-73		
Elem. Schools		White	Negro	% Negro	White	Negro	% Negro	White	Negro	% Negro
1.	*	14	10	41.7	15.8	10.7	40.3	11.9	10	41.8
2.		21	3	12.5	17.1	7	29.0	15.3	9	37.0
3.		35	3	7.9	23.9	12.8	34.8	22.2	13	36.9
4.		18.5	3	14.0	14.3	7	32.8	11.8	8.4	41.6
5.		40	3	7.0	27.8	12	30.1	30.1	11.5	27.6
6.		4	21	84.0	14.8	9.3	38.5	15.7	11	41.1
7.		43	4	8.5	32.5	14	30.1	33.9	12	26.1
8.		24	12	33.3	26	12	31.5	25.5	15	37.0
9.		17	7	29.2	19.7	8	28.8	17.6	6	25.4
10.		28	3	9.7	17.9	7.5	29.5	17.6	7.3	29.3
11.		6	14	70.0	14.5	9	38.2	12.7	12.2	49.0
12.		32	10	23.8	21.2	15	41.4	21	12.5	39.1
13.		28	5	15.2	19.4	12.1	38.4	16.5	9.6	36.8
14.		27	5	15.6	22.1	8.3	27.3	21	9	20.0
15.		14	3	17.6	12.6	5.5	30.3	13.3	5	27.3
16.		30.5	3	9.0	17.5	7	28.5	18.1	9.2	33.7
17.		9	8	47.1	14.6	7.1	32.7	14.4	10.5	42.2
18.		20	4	16.7	15.1	9.4	38.3	14.2	12	45.8
19.		25.5	3	10.5	18.2	7	27.7	19.6	9.2	31.9
20.	*	10	20	66.7	15.4	8.8	36.3	13.3	10.6	44.4
21.		9	2	18.2	8.8	3.4	27.8	7.4	2.6	26.0
22.		14	4	28.6	14.1	6	29.5	13.7	4.6	25.1
23.	*	15	18.5	55.2	19.7	10.8	35.4	15.8	11.6	42.3
24.		39	4	9.3	25.8	12.4	32.4	26.7	14.1	34.5
25.	*	6	23	79.3	16.4	12	42.2	16.2	11.2	40.9
26.	*	10	29	74.4	26	15.4	37.2	20	17.3	46.4
27.	*	8	11	57.9	11	5.6	33.7	11.8	5.4	31.4
28.	*	24	15	38.5	42	22	34.3	23.6	14	37.2
29.	*	14	8	36.4				16.8	8	32.3
30.		22	2	8.3	13.8	9	39.4	16.1	6.5	28.8
31.		21	0	0.0	13.1	7	34.8	11.7	5	29.9
32.		33	6	15.4	23.4	12	33.8	24.3	9.7	28.5
33.		31	10	24.4	31.4	16	33.7	28.4	18	38.8
34.		28	2	6.7	17.2	7	28.9	20.8	7	25.2
35.	*	7	41	85.4	28.4	17	37.4	26.3	20	43.2
36.		11	2	15.4	8.8	4.4	33.3	7.7	4.1	34.7
37.		22	8	23.5	22.9	10.5	31.4	20.9	8.5	28.9
38.	*	7	13	65.0	11.8	7	37.2	9.3	7.4	44.3
39.		24	4	14.3	15.4	7	31.2	20.7	5.4	20.7
40.	*	8	27	77.1	see Louise Troy			11	8	42.1
41.		24	0	0.0	17.8	7.8	30.4	32.8	15.6	32.2
42.	*	14	19	57.6	14.1	11.5	45.3	18.2	11.2	38.1
43.	*	7	9	56.3	10.2	5	32.9	12.9	5	27.9
44.		31	5.5	15.1	23	11.2	32.7	22.8	11.2	32.9
45.		22	3	12.0	14.4	8.5	37.1	13.4	12	47.2
46.		10	2	10.7	7.8	3	27.7	5.9	2.2	27.2
47.	*	7	20	74.1	24.7	15	37.7	14.5	8	35.6
48.		15	3	16.7	13.1	4.2	24.2	12.1	4.6	27.5
49.		26	6	18.8	19.3	11	36.3	19	11	36.7
50.		19	9	32.1	15.6	9.6	38.0	17.3	9	34.2
51.	*	10	37	78.7	24.8	15.3	38.1	20.2	14.3	44.4
52.		19	3	13.6	14.4	6.3	30.4	14.9	7.8	34.4
53.	*	22	33	60.0	35.5	22.4	38.6	33.4	23.2	41.0
54.	*	9	20	69.0	26	16	38.0	21.3	14	39.7
55.	*	8	30	78.9	24.5	16.1	39.6	21.8	21.6	49.8
56.		28	1	3.4	29	15	34.0	27.7	17	38.0
57.		11.5	2	14.8	11.8	2	14.4	12.5	2.4	16.1
58.		14	7	33.3	15.7	6.2	28.3	see Patterson elem.		
Total (Elem.)		1100	583	34.6	1072.1	560.1	34.3	1037.6	582.5	36.0

Defendants' Exhibit AN

RACIAL COMPOSITION OF SCHOOLS
FOR 1970-71, 1971-72 AND 1972-73

	1970-71			1971-72			1971-73		
High Schools	White	Negro	% Negro	White	Negro	% Negro	White	Negro	% Negro
1.	74	10	11.9	63	21	25.0	66.5	20	23.1
2. *	12	59	82.1	33.6	29	46.3	36.5	37	50.3
3.	57	8	12.3	41.6	16	27.7	44.6	19	29.9
4.	39	2	4.9	30	8	21.0	31.8	8	20.1
5.	71	5	6.6	55.6	23	29.2	61.6	19	23.6
6.	92	6	6.1	72.5	23	24.0	72.5	27	27.1
7. *	44	65	59.6	48	32	40.0	41	37	47.4
8. *	21	43	67.2	36	21.5	37.3	35	27	43.5
9.	52	6	10.3	41.2	15	26.6	40.5	18	30.8
10.	79	13	14.1	52	26	33.3	53	25	32.1
11.	58	6	9.4	42.5	14	24.7	42.5	17	28.6
Total (High)	599	223	27.1	516.0	228.5	30.7	525.5	254	32.6
Total (Elem. & High)	1699	816	32.2	1588.1	788.6	33.2	1563.1 2399.60	836.5	34.9

* Denotes schools with 75% or more black student enrollment.

COUNSELOR ASSIGNMENTS BY RACIAL IDENTITY
September, 1968 - 1973 School Year*

October 12, 1972

	1968-69		1969-70		1970-71		1971-72		1972-73	
*Total Counselors	88		105		99.5		99.5		101	
	No.	%	No.	%	No.	%	No.	%	No.	%
Black	25	28.4	40	36.7	31	31.2	36	36	42	41.5
White	63	71.6	69	63.3	68.5	68.8	63.5	64	59	58.4
Black counselors assigned to predominately black schools	25	100	30.5	76.25	24	77.4	12	33.3	20	47.6
Black counselors assigned to predominately white schools	0	0	9.5	23.75	7	22.6	24	66.6	22	52.3
White counselors assigned to predominately white schools	58	92.1	60	87	57.5	83.9	42.5	66.6	36	61.0
White counselors assigned to predominately black schools	5	7.9	9	13	11	16.1	21	33.3	23	38.9

*These figures apply to counselors assigned to Elementary, Middle and High Schools.

287-Ex.
DEFENDANTS' EXHIBIT AO

DAYTON CITY SCHOOL INTEGRATION STATISTICS

HIGH SCHOOL COACHING STAFFS

NUMBER OF SCHOOLS SEGREGATED 100%		1963-64 9	1964-65 8	1965-66 9	1966-67 9	1967-68 7	1968-69 5	1969-70 5	1970-71 3	1971-72 0
1. Belmont	White	12	11	11	10	10	11	11	11	10
	Black	0	0	0	0	0	0	0	0	2
2. Dunbar	White	0	0	0	0	1	1	1	3	7
	Black	8	10	10	10	10	9	8	9	9
3. Fairview	White	8	8	8	10	9	10	10	12	10
	Black	0	0	0	0	0	0	0	1	5
4. Kiser	White	8	8	8	9	10	10	11	11	10
	Black	0	0	0	0	0	0	0	0	2
5. Meadowdale	White	10	9	11	10	13	11	12	12	13
	Black	0	0	0	0	1	1	1	1	3
6. Patterson	White	5	5	6	7	9	15	14	16	11
	Black	0	0	0	0	0	0	1	1	3
7. Roosevelt	White	10	9	9	10	12	10	7	5	8
	Black	3	3	3	2	3	4	8	9	8
8. Roth	White	9	10	10	10	8	2	7	7	9
	Black	3	4	4	1	5	9	4	8	7
9. Stivers	White	9	10	11	10	10	11	11	12	10
	Black	0	1	0	0	0	1	0	0	4
10. Colonel White	White	9	11	10	11	11	11	11	9	9
	Black	0	0	0	0	0	1	2	2	6
11. Wilbur Wright	White	8	11	10	10	11	10	10	11	10
	Black	0	0	0	0	0	1	1	1	3
GRAND TOTALS	White	88	92	94	97	104	102	102	109	107
	Black	14	18	17	13	19	26	28	32	52
		102	110	111	110	123	128	130	141	159

288-Ex.

DEFENDANTS' EXHIBIT AP

289-Ex.

DEFENDANTS' EXHIBIT AQ

Schoolday | Dayton Public Schools

Number 31 | Office of the Superintendent | April 21, 1969

State Survey

Dayton Schools' Record Highest In Employment of Negro Educators

Dayton is a city of employment opportunity for Negro educators.

Dayton schools have the top record in employment of Negro teachers among the state's largest cities.

A district-by-district survey ordered by the State Board of Education discloses that Dayton ranks number one in:

- Proportion of Negro teachers to Negro pupils.
- Proportion of Negro administators to Negro pupils.

The report shows that Dayton, with 38.3 per cent Negro student enrollment, has a 28.6 per cent Negro teaching staff—precentagewise a ratio of three to four.

Only Cleveland employs a higher percentage of Negro teachers, but the ratio of Cleveland's percentage of Negro teachers to percentage of Negro students is only two to three—25 per cent compared to 55 per cent respectively.

Dayton also ranks second in the state in the proportion of total teaching staff that is Negro.

The city ranks second again in total per cent of Negro administrators, its 21.6 per cent exceeded only by Cleveland. The latter's percentage of administators to pupils is a ratio of only two to five, however, compared to Dayton's nearly three to five.

Dayton employs three times the percentage of Negro teachers as the average of the 20 largest districts and four times the percentage of administrators, the report shows.

The totals for the 20 cities reveal 9.5 per cent of their teachers and 5.5 per cent of the administrative staffs are Negro, compared to the Dayton figures of 28.6 per cent and 21.6 per cent.

Employment in Large Ohio Cities

City	% Negro enrollment	% Negro teachers	% Negro Administrators
Akron	25.8%	7.6%	13.2%
Canton	19.6%	6.0%	1.3%
Cincinnati	42.9%	22.9%	14.3%
Cleveland	55.9%	37.9%	23.5%
Columbus	26.0%	12.6%	11.3%
DAYTON	38.3%	28.6%	21.6%
Toledo	26.7%	17.0%	12.7%
Youngstown	40.9%	7.5%	12.0%
20-city total	18.9%	9.5%	5.5%

290-Ex.

DEFENDANTS' EXHIBIT AR

	SCHOOL & ADDRESS		% OF MINORITY STUDENTS BY YEAR						
	Elementary Schools (32)		1963	1967	1968	1969	1970	1971	1972
			64	68	69	70	71	72	73
1.	Jane Addams	35 Victory Drive	61.6	67.7	73.8	78.7	80.3	81.7	78.7
2.	Allen	132 Alaska Street	0.6	0.2	0.1	0.1	0.2	0.6	0.6
3.	Belle Haven	4401 Free Pike	0.0	0.3	3.0	3.7	6.8	10.3	17.7
4.	Belmont Elem.	2745 S. Smithville Road	0.0	0.0	0.0	0.0	0.0	0.0	9.4
5.	E. J. Brown	48 W. Parkwood Drive	0.3	0.3	0.6	0.8	1.0	1.0	2.2
6.	F. C. Carlson	807 S. Gettysburg	95.9	99.1	99.0	99.7	99.8	99.3	99.0
7.	Cleveland	1102 Purnell Avenue	0.0	0.0	0.0	0.1	0.1	0.3	0.8
8.	Drexel	143 Miller Avenue	3.3	6.1	3.7	4.3	5.2	4.3	8.2
9.	Edgemont	1480 Edgedale Road	0.0	0.0	0.0	0.0	0.0	0.0	0.7
10.	Edison	228 N. Broadway	80.0	95.9	97.3	98.1	98.8	99.7	99.7
11.	Emerson	501 Hickory Street	0.0	0.0	4.3	13.6	11.8	3.6	8.9
12.	Fairport	1952 Fairport Avenue	0.0	0.0	0.1	4.6	9.7	29.7	39.1
13.	Fairview Elem.	1305 Fairview Avenue	1.0	1.1	1.7	3.7	4.3	7.4	14.6
14.	Ft. McKinley	3725 Evansville Avenue	0.0	0.0	0.0	2.3	9.6	1.6	2.6
15.	Franklin	2617 E. Fifth Street	0.0	0.0	3.0	0.0	0.0	0.0	0.3
16.	Garfieldale	1733 N. Gettysburg	7.9	23.6	28.5	43.2	71.9	72.1	78.9
17.	Gettysburg	2201 N. Gettysburg	0.0	4.3	5.2	6.6	9.4	14.5	22.7
18.	Gorman	156 Grant Street	15.6	22.3	21.1	17.6	16.3	11.3	11.8
19.	U. S. Grant	4329 Arcadia Blvd.	0.3	0.1	0.1	0.9	0.6	0.6	0.3
20.	Grace A. Greene	503 Edison Street	89.5	97.6	96.8	97.3	96.7	98.5	96.2
21.	Hawthorne	226 McDaniel Street	0.0	0.0	0.0	0.0	0.0	20.1	28.0
22.	Hickorydale	2101 Hickorydale	0.0	0.0	4.6	17.3	8.2	13.5	12.9
23.	Highview	2101 MacArthur Avenue	82.3	96.4	97.0	98.2	98.1	97.9	96.7
24.	Huffman	100 Huffman Avenue	0.9	0.0	0.0	3.4	3.2	0.1	0.1
25.	Irving	355 Cincinnati Street	96.6	98.3	99.0	100.0	99.7	99.5	99.2
26.	Jackson Elem.	317 Abbey Avenue	98.5	98.6	99.1	99.5	99.5	99.4	99.9
27.	Jackson Prim.	1201 McCall Street	96.2	19.7	98.5	99.2	99.4	99.1	99.7
28.	Jefferson Elem.	1231 N. Euclid Avenue	1.2	58.5	68.1	80.3	73.2	91.3	94.9
29.	Jefferson Prim.	1223 N. Euclid Avenue	1.2	48.8	57.1	72.0	83.3	88.0	93.5
30.	Kemp	819 Shadbourne Avenue	0.0	0.0	0.0	0.0	0.0	7.2	7.0
31.	Lawton	4032 Linden Avenue	0.0	0.0	0.0	0.0	0.2	0.6	1.8
32.	Lincoln	401 Nassau Street	0.0	0.0	0.0	0.2	0.3	1.0	0.6
33.	Chas. L. Loos	45 Wampler Avenue	1.9	1.2	4.6	5.0	9.5	4.0	5.8
34.	Meadow Wine	713 Krebs Street	0.0	0.5	0.2	7.0	11.1	0.7	3.1
35.	McGuffey	1932 Webster Street	0.0	10.9	14.4	18.3	24.2	32.0	41.6
36.	McMary Park	2400 Hoover Avenue	x	99.4	99.4	98.8	100.0	100.0	100.0
37.	Meadowdale Elem.	4448 Thurgood Drive	0.0	0.0	0.0	12.8	7.7	9.2	12.6
38.	Miami Chapel	1630 Miami Chapel	99.4	99.8	99.9	99.6	99.7	100.0	99.6
39.	Patterson/Kennedy	238 Wyoming Street	0.0	0.1	0.0	0.0	0.0	0.3	4.0
40.	Residence Ph. Elem.	833 Elmhurst Road	95.0	97.6	98.8	99.2	99.7	99.7	99.8
41.	Residence Ph. Prim.	4411 Oakridge Drive	80.0	97.3	99.3	99.3	98.9	99.8	100.0
42.	Rushin	279 McClure Street	0.0	0.0	7.0	4.3	3.7	0.1	0.3
43.	Shiloh	1670 Philadelphia Dr.	2.4	0.1	0.1	6.0	7.4	0.9	8.4
44.	Sheep Hill	450 Sheep Hill Road	0.9	0.3	7.1	13.4	13.9	1.4	3.8
45.	Louise Troy	1465 Richley Avenue	99.8	100.0	100.0	99.7	99.9	99.7	99.1
46.	Valerie	4020 Brookwood Drive	x	0.0	7.5	17.4	20.0	13.5	24.0
47.	Van Cleve	45 W. Helena Street	0.9	1.9	1.1	1.7	2.1	14.9	20.2
48.	Washington	2900 E. First STreet	23.0	20.3	19.4	16.6	16.4	14.3	15.3
49.	Weaver	1000 Howell Avenue	98.8	99.9	99.9	100.0	99.9	99.7	99.5
50.	Webster	1113 Keifer Street	0.1	0.0	0.0	0.8	0.4	0.4	1.0
51.	Westwood	2410 Hoover Avenue	96.7	98.9	99.4	99.5	99.6	99.5	99.7
52.	Wogaman	2716 Germantown St.	100.0	99.7	100.0	100.0	99.5	99.8	100.0
	Middle Schools (5)								
53.	Cornell Heights	2926 Campus Drive	0.0	26.4	44.2	39.1	69.6	72.3	80.3
54.	Longfellow	265 Salem Avenue	3.8	48.7	42.3	30.2	53.9	60.7	64.1
55.	F. C. MacFarlane	215 S. Summit Street	99.6	99.7	99.9	99.9	99.8	99.5	99.6
56.	Whittier	721 Miami Chapel	93.6	99.4	99.2	99.2	99.0	99.3	99.3
57.	Orville Wright	200 S. Wright Ave.	0.0	0.0	0.0	0.8	0.4	6.7	6.1
	High Schools (11)								
58.	Belmont	2323 Mapleview Ave.	0.0	0.1	0.1	0.5	1.2	2.7	5.2
59.	Dunbar	2222 Richley Ave.	92.7	97.9	99.3	99.4	99.8	100.0	100.0
60.	Fairview	2404 Philadelphia Dr.	0.9	8.1	5.2	3.3	12.7	19.1	24.1
61.	Kiser	1401 Lee Street	2.7	0.9	1.8	5.4	4.8	6.4	9.8
62.	Meadowdale	4417 Williamson Dr.	0.0	0.9	1.1	1.4	2.9	5.2	10.6
63.	Patterson Co-op	118 E. First Street	1.8	12.8	14.3	22.2	29.8	31.3	32.9
64.	Roosevelt	2013 W. Third Street	94.3	99.4	100.0	99.8	100.0	99.9	100.0
65.	Roth	4535 Hoover Ave.	53.5	89.7	92.3	94.4	97.8	96.5	95.8
66.	Stivers	1313 E. Fifth Street	2.6	1.4	0.6	3.9	10.8	12.3	14.0
67.	Colonel White	501 Niagara Ave.	1.1	8.4	19.3	28.9	42.1	43.9	34.4
68.	Wilbur Wright	1361 Huffman Ave.	3.3	3.2	3.3	4.2	4.7	5.5	9.2

291-Ex.

DEFENDANTS' EXHIBIT AS

Synopsis of Percent of Minority Students
By School
Elementary

Year	All White	All Black
1963-64	22	1
1967-68	18	1
1968-69	13	2
1969-70	7	3
1970-71	5	1
1971-72	3	2
1972-73	0	3

High Schools

Year	All White	All Black
1963-64	2	0
1967-68	0	0
1968-69	0	1
1969-70	0	0
1970-71	0	1
1971-72	0	1
1972-73	0	2

292-Ex.

DEFENDANTS' EXHIBIT AT

Number of Schools
By Student Racial Composition
Dayton City Schools

% Negro Composition	1963-64	1967-68	1968-69	1969-70	1970-71	1971-72	1972-73
90-100%	13	19	20	20	20	21	22
80-89%	4	1		1	2	2	1
70-79%		1	1	2	2	2	2
60-69%			1		1	1	1
50-59%	1	1	1	2	1		2
40-49%	1	2	2	1	1	1	1
30-39%	31.1					4	2
20-29%	1	4	2	2	3		5
10-19%	2	3	4	9	8	10	7
0-9%	43	39	38	32	31	28	25
City Average	31.1	37.4	37.7	39.3	40.6	42.7	44.6

Compiled by: Division of Research
Management Services Department

DEFENDANTS' EXHIBIT AZ

EFFORTS TOWARD INTEGRATION IN DAYTON PUBLIC SCHOOLS

Trends and efforts toward integration of both pupils and staff of Dayton schools are obvious in the establishment of a freedom of enrollment policy, the organization and activities of human relations councils, the holding of desegregation in-service education program as well as workshops and retreats to study current social problems, the design of student exchange programs and the use of gifts to our schools for human relations projects.

Other efforts are evidenced by the many projects of the Office of Equal Educational Opportunity in the Dayton school district; the publications, teaching demonstrations, and other curriculum developments of the Negro History division of the instruction department; and reports of desegregation surveys and research studies made in Dayton public schools.

Efforts Toward Integration Through Student Activities

Lack of communication among students, teachers and administrators has been cited as a major factor in school concerns. Many authorities concur that an exchange of views among these persons would alleviate many of the problems currently facing the secondary schools. Students not only must be given a chance to speak, they must also be given the opportunity to be heard. It has become evident to the Office of Student Relations that students, teachers and administrators should be involved in a continuing dialogue over problems important to the school. If this dialogue takes place, the majority of stress and disruptions need not happen. A frank exchange of ideas with students is often a means of warding off barriers to communication which give rise to forceful dissent. That students clamor for more opportunities to be heard indicates

that the concept of youth becoming deeply involved in student programs is a highly significant direction in which schools should be moving.

The following student activities now initiated in Dayton public schools give our students an opportunity to experience meaningful integrated experiences.

Freedom of Enrollment

The Dayton School Board approved a Freedom of Enrollment Policy, effective September, 1969, to assist in providing quality integrated education for all public school students. The policy provides that within certain limitations any student in the school system is eligible to attend any of its schools. The limitations include requirement that space be available in the requested school, that special courses be attainable only in the requested school and that the student's presence in the school will improve racial balance in that building.

Any two students or numerically equal groups may exchange places if the exchange improves the racial balance. The Freedom of Enrollment Policy extends to Elementary Schools as well as High Schools. There have been 405 students transferred under the Freedom of Enrollment Policy. Tables 4 and 5 present statistics pertaining to this program.

TABLE 4. FREEDOM OF ENROLLMENT REPORT, FIRST SEMESTER, SEPTEMBER 22, 1970

	Non-Minority	Minority	Total
Total Number (Elementary & High School)			
Applications Received	53	282	335
Approvals	28	140	168
Disapprovals	25	142	167
Elementary School			
Approvals	6	*43	49
Disapprovals	2	**16	18
Reasons for Disapprovals			
Racial balance not improved	1	5	6
Lack of classroom space	1	9	10
Lack of transportation	0	2	2
Not in good standing	0	0	0
High School			
Approvals	22	97	119
Disapprovals	23	126	149
Reasons for Disapprovals			
Racial balance not improved	5	52	57
Lack of classroom space	9	59	68
Lack of transportation	0	9	9
Not in good standing	0	4	4
Course attainable at home school	9	2	11

*1 Hindu
**2 Spanish-surnamed Americans

Defendants' Exhibit AZ

TABLE 5. ELEMENTARY AND HIGH SCHOOL FREEDOM OF ENROLLMENT APPROVALS BY SCHOOL AND GRADE

Elementary Schools	Grades	Total	Schools	Grades	Total	High Schools	Grades	Total
Brown	7,8	2	Lawton	8	1	Belmont	9-17,10-3, 12-1	21
Cleveland	1,6	2	Meadowdale	6,8	2	Dunbar	10	1
Edison	1	1	Ruskin	5,8	2	Fairview	9-24,10-6, 11-1,12-1	32
Fairport	K,5	2	Valerie	K-2,1-1, 2-1,3-1, 5-1,6-2, 7-2,8-1	11	Kiser	9-2,10-1, 11-4	7
Fairview	K-1,1-1, 6-3,7-2, 8-4	11	Van Cleve	3-1,4-1, 6-1,8-2	5	Meadowdale	9-19,10-7, 11-2,12-2	30
Gettysburg	6-2,7-1	3	Westwood	3-1,8-1	2	Roth	12	1
U.S. Grant	4,6	2				Stivers	9-8,10-1, 11-3	12
Jefferson Pr.	1	1				Col. White	11-2,12-1	3
Jefferson El.	3,6	2				W. Wright	9-8,10-1, 11-3	12

Plaintiffs' Exhibit AZ

Student Human Relations Councils

Most programs involving human relations and interactions were organized in the local school buildings. The local school personnel best knows its own students, teachers and parents. The students in these schools may have concerns totally unlike those in any other school in our system, so a local building Human Relations Planning Council initiates programs involving staff with students and students with students. In the more successful programs the Human Relations Councils include the principal as well as other staff members chosen wholly or in part by the students. The local Human Relations Council Faculty Advisor meets with the students regularly during the school hours or evenings.

All City Human Relations Council. Subsequent to organizing some local human relations councils, students recognized that certain concerns of human relations and meaningful interactions appeared to be district wide in nature. That is, all senior high schools may deal with students having certain similar types of concerns. Therefore, the All City Human Relations Council was established with the following purposes:

a. To develop a better understanding and mutual regard of all people.

b. To coordinate the activities of the Human Relations Councils of all the member schools.

c. To develop insights among students which may support the attitudes in behavior patterns that tend to improve human relations in all schools.

Humanities in progress. An organization called Humanities in Progress was initiated to provide a program for a small number of students on a demonstration basis. These students would be able to take back to their individual classes the insights gained both from an unusual seminar content and from the interaction of participants from diverse cultural and

ethnic backgrounds. The Humanities in Progress program was discontinued because of lack of funds.

Retreats

Community workshop. A retreat or workshop was held at the Third Baptist Church. This workshop included representation from the following areas: NAACP, Suicide Prevention Center, Southern Christian Leadership Council, The United Theological Seminary, Living Arts, and the Negro History Department from the Board of Education.

All City Human Relations Council retreat. A weekend retreat at Bergamo Youth Center was planned by the students from the All City Human Relations Council. It was an attempt to help each student develop: (a) respect for the rights and opinions of others; (b) a realization that prejudices often stem from lack of understanding; (c) recognition that there are similarities and differences, but differences do not necessarily denote superiority or inferiority.

Cultural contributions retreat. A retreat was held at the Art Institute which dealt with the cultural contributions by persons of different ethnic and religious backgrounds. A second theme of this workshop concerned changing communities and their effects upon school, real estate brokers and social conditions. Resource aid for this workshop was drawn primarily from the Dayton View Stabilization Program.

Community power structure retreat. Mrs. Velma Strode, Community Relations Office, Washington, D.C., was a resource person to students in a workshop that outlined the power structure of our community and what it means. The purpose of this retreat was to explore constructive methods of involving the community and students in bringing about change within the community and school.

Communications skills workshop. A retreat was held at the University of Dayton's east campus to deal with communications skills. The purpose of this communications skills workshop was to assist students in basic communications skills which may have some application in their own school organizations. Members of the Student Senate Advisory Forum, which was formulated as a clearinghouse for student activities on a city-wide basis, were in attendance.

Glen Helen retreat. A weekend retreat was held at Glen Helen, Yellow Springs, Ohio. The purpose of this retreat was to help students develop some degree of (a) sensitivity to and understanding of each person — his importance to the group and his special talents; (b) ability to put general welfare above individual interests; (c) recognition that rules and standards are necessary for group living; (d) ability to work together to achieve common goals.

Exchange Programs

Student exchanges within and outside the school district have been rather extensive. High school and elementary school student exchanges have shown a constructive potential for future orientation programs. One of the primary purposes of student exchange is to allow students to share in school experiences that may differ from experiences in their own school.

Exchanges to establish new friendships. Students of one west side school visited a school outside our district. They spent the day at the school. Each student was invited to have supper in the home of a host student. All students met at the school that evening and attended a basketball game.

City-wide exchange program. Currently students are planning a city-wide exchange that will include the parochial schools. Twenty-six students will visit each high school. The purpose of this student exchange, which is being organized by the student group STRATE (Students Taking Responsible Action Toward Education), is to promote better understanding among students, teachers and administrators. It will allow

Plaintiffs' Exhibit AZ

students to observe the environment and participate in some of the activities of another school. While doing so they will have opportunity to discuss mutual problems and ideas with students in the other environments. They will discuss for instance, school dress codes, student councils, time schedules and projects being planned by the school.

Special Gifts

A special gift was donated by the McConnaughey Family of Cincinnati to be used for promoting human relations activities in the Dayton School District. Funds have been used in many ways.

NEA conference. Two students used funds to attend the NEA's Human Relations Conference in Washington, D.C. One of the students from the Dayton Public Schools presented a position paper, "Student Involvement in Human Relations," which was endorsed by the conferees.

Consultant services. Consultant aid was provided from the Special Gift Fund for human relations facilitators in planning experimental projects for orienting elementary feeder school students before entering high school.

Workshops and conferences. The funds provided a communications workshop for students so that skills might be learned to enhance human relations, and they also paid expenses for a student to attend the Ohio School Board Association Conference in Columbus, Ohio. The funds also provided transportation and other services that would encourage and support human relations activities in various schools.

Unused funds. Any remaining funds will be used to assist in a nominal way any human relations activity within the local district. It has proved beneficial to keep seed money to which will be added possible future gifts.

DEFENDANTS' EXHIBIT BA

Students Transported from Jefferson in 1969-70 to:

Fairport	18
Ft. McKinley	22
Loos	42
Horace Mann	37
Hickorydale	19
Shiloh	51
Shoup Mill	62
Valerie	81

Students Transported from Westwood in 1969-70 to:

Irving	17
Miami Chapel	24
Meadowdale Elementary	40

Students transported from Edison in 1971-72 to:

Belle Haven	42
Gettysburg	42
Hickorydale	24
Meadowdale Elementary	46

DEFENDANTS' EXHIBIT BQ

THURSDAY – MARCH 27, 1969 – SPECIAL MEETING

Mr. Chester Gooding, Principal, Stivers High School, was introduced by Dr. Levy and asked to present his views to the Board concerning the request that the present boundary lines of his school be expanded. At the conclusion of his remarks, Mr. Gooding emphasized that redistricting of the Stivers district would provide an increased enrollment enabling the school to increase its course offerings, allow more flexibility and increase the efficiency of the use of the Stivers High School facilities.

Dr. William Goff, Director of Pupil Personnel Services, then presented a series of four (4) recommendations to the Board for its consideration, the adoption of which would increase the enrollment of the school by approximately 166 students in school year 1969/70, based on present estimates. It was proposed that the present two optional areas between Stivers and Belmont and Wilbur Wright High Schools be eliminated and made a permanent part of the Stivers district, that the Walnut Hills area of the Lincoln Elementary School district now assigned to Belmont High School be transferred to the Stivers district, and that the areas east of Interstate Highway 75 whose students now attend Roosevelt and Dunbar High Schools be tranferred to the Stivers District.

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Mr. Martin arrived at the meeting at this point.

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Dr. Wayne M. Carle, Superintendent of Schools, gave three major reasons for the proposed changes:

1. All pupils would continue to be within a reasonable distance of the school.

2. The proposed new boundary lines would make a sensible symmetrical pattern.
3. The new enrollment of students would give Stivers High School a broad cross section of the urban area racially, culturally and socio-economicaly.

A number of residents of all the areas affected offered comments both for and against the proposal. After a lengthy hearing and discussion, the Board took the matter under advisement pending future presentation of final recommendations by the Superintendent of Schools.

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DEFENDANTS' EXHIBIT BS

THURSDAY – OCTOBER 2, 1969 – REGULAR MEETING

The following Resolution was introduced by Dr. Carrell, seconded by Mr. Lucas:

WHEREAS, this Board has committed itself to the achievement of quality integrated education, and,

WHEREAS, the organizational life and activities of the schools are an important part of the total curriculum that should be a living laboratory of democratic values and equal opportunity, and,

WHEREAS, Section 7.01.8 of the Handbook of Policies, Rules and Regulations provides that "Any contest or activity which excludes students because of race, color or creed is strictly prohibited."

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Ctiy School District that the following be and hereby is adopted as paragraph b, to be added to Section 7.01 of the Policies, Rules and Regulations.

It is the policy of the Board of Education to permit to exist in the schools only those student organizations and activities which include in their constitution, rules and practices, provision for equal and democratic participation of all students regardless of their religion, race, creed, color or economic status.

No organization is authorized which is exclusive with respect to, or tends to foster discrimination by virtue of, a student's religion, race, creed, color or economic status.

Consistent with democratic principles, provision shall be made in all curricular and co-curricular activities to encourage the inclusion and active participation of minority groups and the free and open expression of all points of view.

YEAS: Carrell, Martin, Lucas, Price, Seaman, Shellabarger, and Levy – 7

NAYS: None.

The Resolution was declared adopted.

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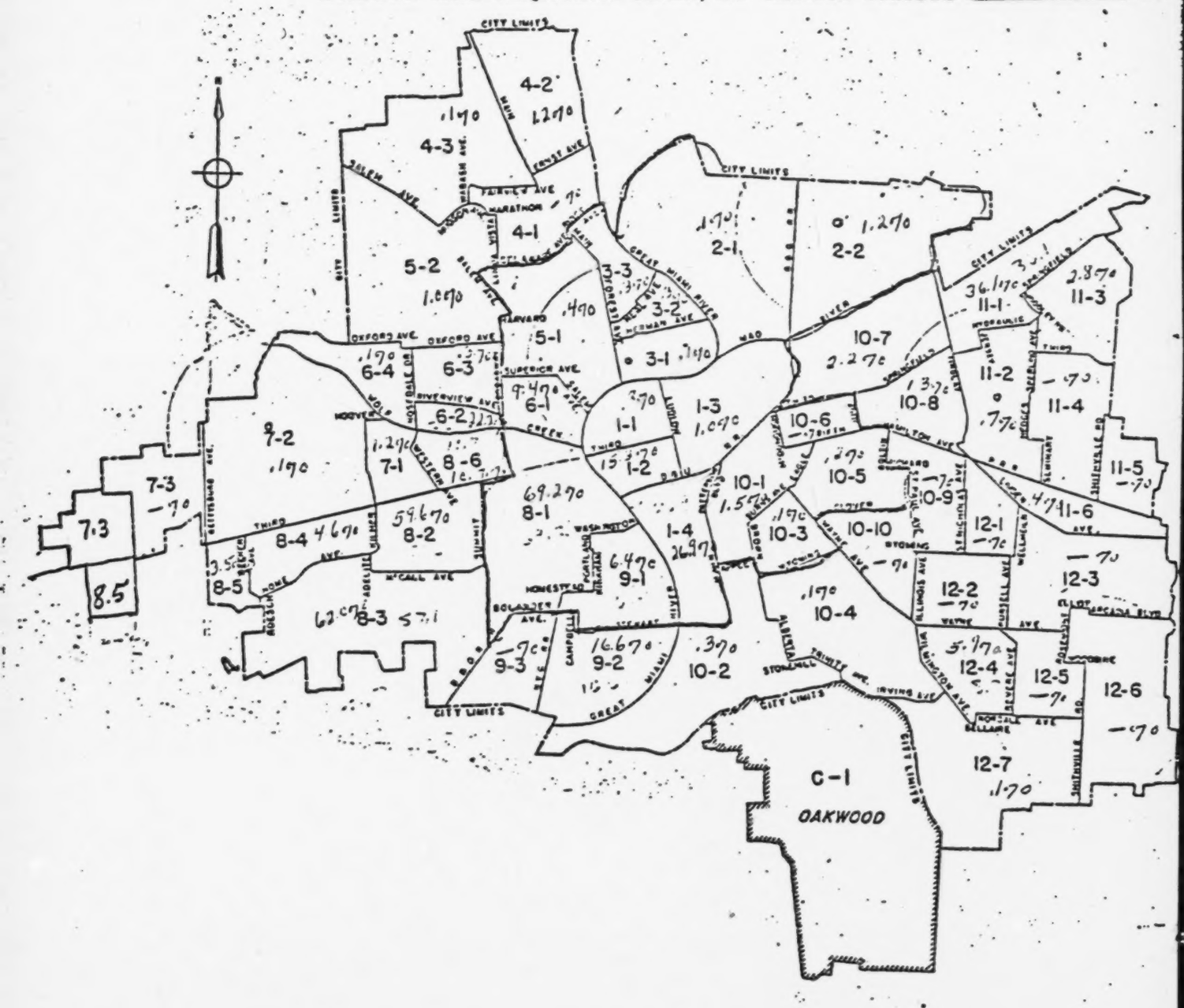
DEFENDANT'S EXHIBIT NO. BY

DAYTON AND ADJACENT AREA, BY CENSUS TRACTS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OXFORD AVE
RIVERVIEW AVE
SUPERIOR AVE
HOOVER AVE
WESTERN AVE
MCCALL AVE
HOMESTEAD
SOLDIERS AVE
CAMPBELL
STEWART
WEBSTER
PORTLAND
WOODMAN
WYOMING
STONELICK
IRVING AVE
WAYNE AVE
RUSSELL AVE
WILMINGTON AVE
SPRINGFIELD
HARSHMAN
MAIN
KEOWEE
MARATHON
FLORIDA
PRESTON
WILLIAMS
ILLINOIS AVE
SEVILLE
ARCADIA BLVD
ABBOTSFORD
WELLINGTON
SHULENBURG
SPRINGVILLE
SHERIDAN
SHERWOOD
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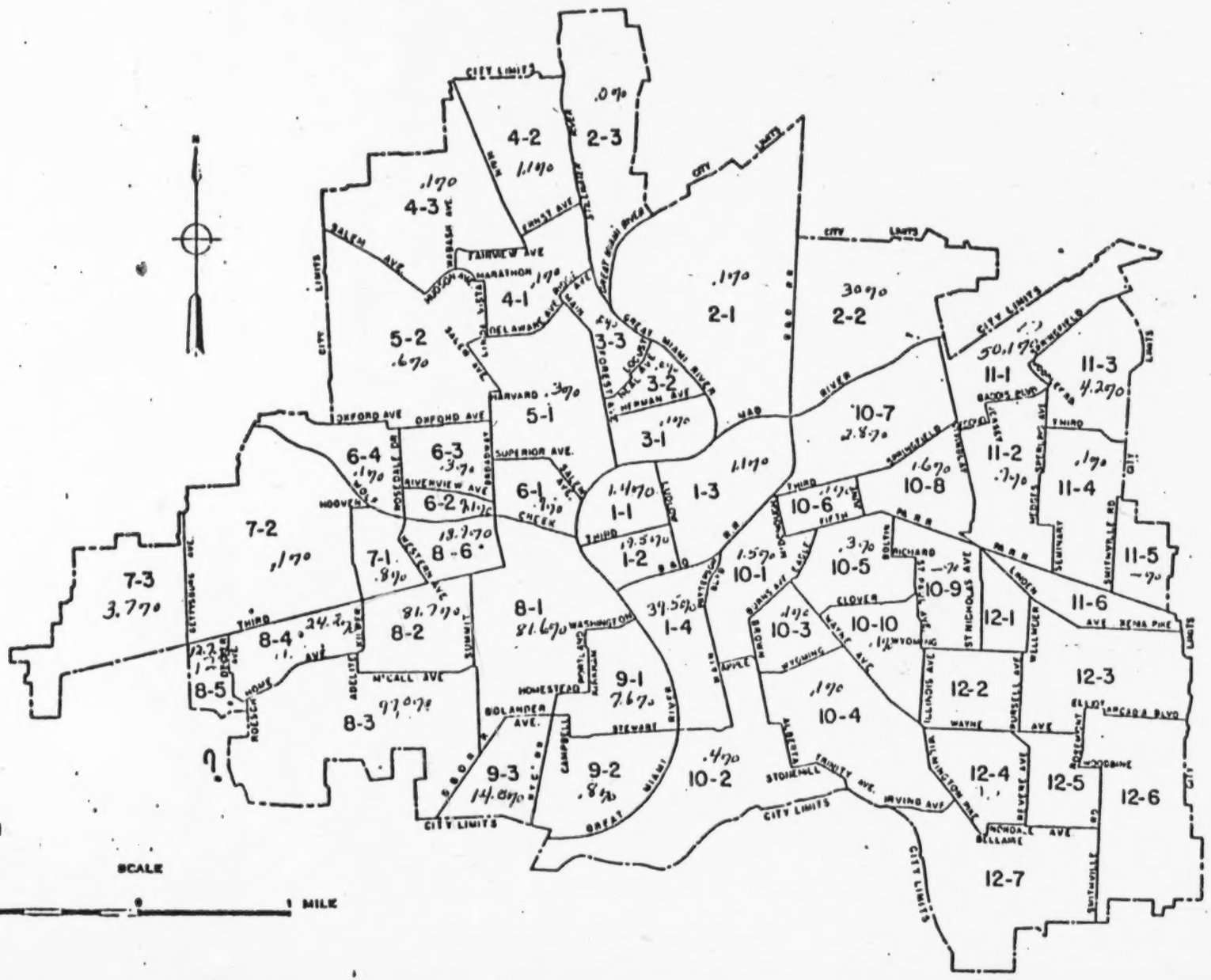
DAYTON, OHIO, AND ADJACENT AREAS BY CENSUS TRACTS

Part 1.—Tracts in Dayton city 14.070



Defendants' Exhibit BY

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DEFENDANT'S EXHIBIT NO. BY

1450

S. TRACTS IN DAYTON, OHIO AND ADJACENT AREA
1960 Census Tracts

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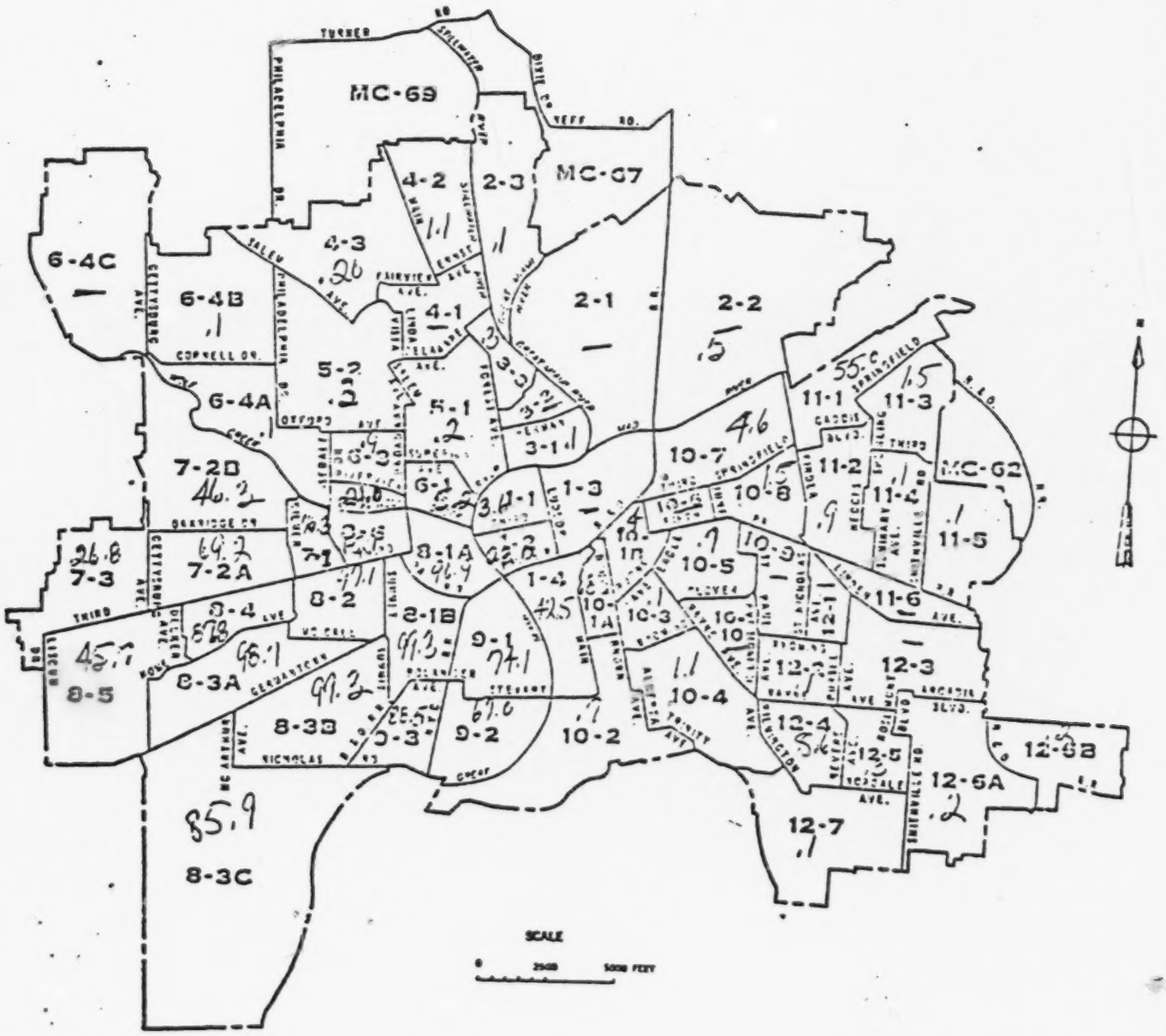


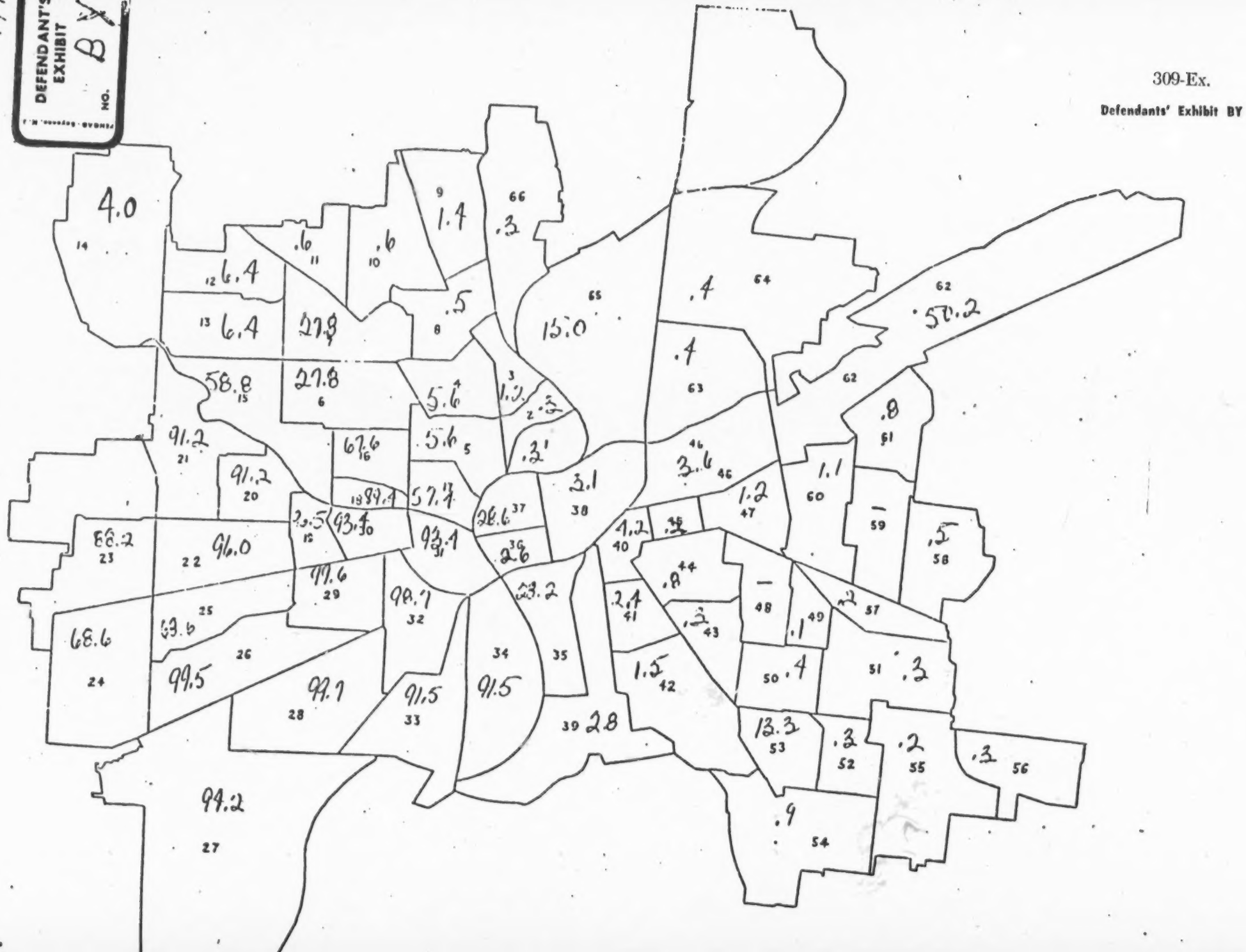
INSET A - DAYTON CITY AND ADJACENT AREA

308-Ex.
Defendants' Exhibit BY

DEFENDANT'S EXHIBIT NO. BY

309-Ex.

Defendants' Exhibit BY



310-Ex.

DEFENDANTS' EXHIBIT CI(2)

ROOSEVELT HIGH SCHOOL

Graduating Class with Number of Students by Race
From the Colonel White-Roosevelt Optional Zone

Years	Total in Graduating Class White	Total in Graduating Class Black	Optional Zone White	Optional Zone Black
1957-58	119	194	5	2
1958-59	103	109	10	0
1959-60	56	271	9	2
1960-61	16	301	2	3
1961-62	19	335	0	4
1962-63	12	292	2	1
1963-64	10	352	1	0
1964-65	5	265	1	2

Supplied by Roosevelt High School
11-9-72

311-Ex.

DEFENDANTS' EXHIBIT CM

Racial Composition
Non-Teaching Personnel

	1971-72 BLACK	1971-72 WHITE		1972-73 BLACK	1972-73 WHITE	
Clerical:						
Schools	52	98		52	78	
Others	28	92		45	102	
All	80	190	T270	97	180	T277
Food Service:	82	125		93	150	
Truck Drivers	—	—		2	6	
All	82	125	T207	97	156	T253
Maintenance & Transp.						
Trades	0	30		0	30	
Laborers	2	6		2	6	
Truck Drivers	2	2		2	1	
All	4	38	T42	4	37	T41
Bus Drivers	8	6		7	7	
All	8	6	T14	7	7	T14
Operations						
Schools	143	159		133	162	
Others	4	1		3	2	
All	147	160	T307	136	164	T300
Other						
Stock Clerks	3	8		2	10	
Truck Driver	2	2		2	2	
All	5	10	T15	4	12	T16

312-Ex.

Defendants' Exhibit CM

	TOTALS		BLACK		% BLACK	
Clerical						
1971-72	270		80		30%	
1972-73		277		97		35%
Food Service						
1971-72	207		82		40%	
1972-73		253		97		38%
Maintenance & Transp.						
1971-72	42		4		9%	
1972-73		41		4		10%
Bus Drivers						
1971-72	14		8		57%	
1972-73		14		7		50%
Operations						
1971-72	307		147		48%	
1972-73		300		136		45%
Other						
1971-72	15		5		33%	
1972-73		16		4		25%
1971-72	855		326		38%	
1972-73		901		345		38%

Staff Development Dept.
Classified Personnel Div.
Dayton Public Schools
10/27/72

313-Ex.

DEFENDANTS' EXHIBIT CN

TRANSFER REQUESTS FOR 1972-73

SCHOOL ASSIGNED	SCHOOL REQUESTED		GRANTED	NOT GRANTED	GRANTED IF ROOM	PLACED ON WAITING LIST	DID NOT KEEP APP
Dunbar 100	Edison	43.0		1			
	Grace A. Greene	6.5		1			
	Irving	46.6		1	5		
	Jackson	35.4	1				
	Weaver	67.6	2	1			
	Whittier	34.9	2				
	Wogaman	100.0	2				
Edison 43.0	Dunbar	100.0					1
	Irving	46.6					1
	Roosevelt	31.5		1			
Emerson 1.5	Dunbar	100.0	1				
Garfield 100	Central	33.9	1 -	4 -			1
	Dunbar	100.0	6 -	1 -	6 -		1
	Edison	43.0	8 -	6 -	3 -		1
	Grace A. Greene	6.5	4 -		3 -	1	1
	Irving	46.6		7 -	1 -		2
	Weaver	67.6	14 -	2 -			
	Willard	100.0	4 -				
	Wogaman	100.0	2 -				
Grace A. Greene 6.5	Weaver	67.6	1				
Irving 46.6	Roosevelt	31.5					

SCHOOL ASSIGNED		SCHOOL REQUESTED		GRANTED	NOT GRANTED	GRANTED IF ROOM	DID NOT KEEP AP
Whittier	29.9	Jackson	35.9				1
		Willard	100.0	3			
Willard	100.0	Edison	93.0	1			1
		Garfield	100.0				
		Irving	46.6	6	2	3	3
		Jackson	35.9	2			
		Weaver	67.6	6	2	1	
		Whittier	29.9	11		2	1
		Wogaman	100.0	2		1	1
Wogaman	100.0	Any mixed school					1
		Central	93.9		2		
		Dunbar	100.0	2	2		
		Highview	1.7	6	2		7
		Irving	46.6	2	2	5	
		Jackson	35.9	35	6	20	4
		Roosevelt	31.5				1
		Weaver	67.6	14	8	4	4
		Whittier	29.9			1	
		Willard	100.0	1			2
TOTAL				151	53	55	35

DAYTON PUBLIC SCHOOLS

Veterans Administration Student Attendance at
Residence Park Elementary School 1957-1972

	NAME	YEAR	RACE		NAME	YEAR	RACE
1.	Melora Bactist	1964	W	25.	Caryle Kinkade	1965	Unknown
2.	Ray Bumgarner	1958-59	W	26.	Roy Kenney	1958-60	B
3.	Judith Brimbury	1965-67	Unknown	27.	Debra Kenney	1957-60	B
4.	James Brimbury	1965-67	"	28.	Cheryl Kenney	1957-60	B
5.	Thomas Cogbill	1963-66	W	29.	Susan Levin	1962-63	W
6.	Patricia Davis	1959-61	W	30.	Betsy Levin	1962-63	W
7.	Rebecca Elliott	1958-61	W	31.	Valerie Lefkan	1961-62	W
8.	Susan Edman	1957-61	W	32.	Richard Lefkan	1957-58	W
9.	Lolee Edman	1957-61	W	33.	Lesley Lefkan	1959	W
10.	James Fletcher	1956-57	W	34.	Daniel Leary	1960-61	W
11.	Genevieve Genao	1964-65	W	35.	Thomas Laneve	1961-62	W
12.	Angela Genao	1964-65	W	36.	Patricia Laneve	1962-63	W
13.	Sean Gabe	1958-59	W	37.	Mary Laneve	1959-60	W
14.	Marguerite Gabe	1958-59	W	38.	Joseph Laneve	1960-61	W
15.	George Hill	1962-63	B	39.	Sarah Matre	1958-59	W
16.	Obie Hicks	1958-60	B	40.	Lisa Matre	1959-60	W
17.	William Hicks	1959-60	B	41.	Mario Nieto	1962-63	W
18.	Mary Hicks	1958-60	B	42.	Diana Nieto	1962-63	W
19.	Calvin Hicks	1958-60	B	43.	Andrea Salerino	1964-66	Unknown
20.	Michael Ireton	1958-62	W	44.	Danny Suttenfield	1959-60	W
21.	Kevin Ireton	1961-62	W	45.	Susan Stephens	1962-63	W
22.	Kathleen Ireton	1960-62	W	46.	Helen Stephens	1958-63	W
23.	Margaret Klingenberg	1956	W	47.	Robert Taylor	1958-59	W
24.	Kristen Kinkade	1965-66	Unknown	48.	Larry Taylor	1958-59	W

The above information from permanent record cards was obtained
from Mr. Raymond Swann, Principal at Residence Park Elementary

DEFENDANTS' EXHIBIT CO 315-Ex.

316-Ex

317-Ex.

DEFENDANTS' EXHIBIT CP

DAYTON PUBLIC SCHOOLS

Veterans Administration Student Attendance at
Jackson Schools 1957-1972

No child living at the Veterans Administration Center is in the records at the schools for 1957-1972.

The above information from permanent record cards was obtained from Mrs. Carrie Mallette and Mr. Richard Bradfield, Principals of the Jackson Complex.

DEFENDANTS' EXHIBIT CQ

AFFIDAVIT

STATE OF OHIO
MONTGOMERY COUNTY, SS:

NORMAN FEUER, being first duly sworn, deposes and says that he is the Principal at Fairview High School, that he has checked the student enrollment cards for the students listed on the exhibit which is attached hereto as Exhibit A; that such check reveals that none of these students, except Ray Bumgarner, ever attended Fairview High School; that Ray Bumgarner did not graduate from Fairview but rather from Roth.

Further affiant saith not.

• • •

Defendants' Exhibit CQ

EXHIBIT A

Students living at V.A. Center 1957-1972

	NAME	YEAR	RACE
1.	Melora Battist	1964	W
2.	Ray Bumgarner	1958-59	W
3.	Judith Brimbury	1965-67	Unknown
4.	James Brimbury	1965-67	Unknown
5.	Thomas Cogbill	1963-66	W
6.	Patricia Davis	1959-61	W
7.	Rebecca Elliott	1958-61	W
8.	Susan Edman	1957-61	W
9.	Lolee Edman	1957-61	W
10.	James Fletcher	1956-57	W
11.	Genevieve Genao	1964-65	W
12.	Angela Genao	1964-65	W
13.	Sean Gabe	1958-59	W
14.	Marguerite Gabe	1958-59	W
15.	George Hill	1962-63	B
16.	Obie Hicks	1958-60	B
17.	William Hicks	1959-60	B
18.	Mary Hicks	1958-60	B
19.	Calvin Hicks	1958-60	B
20.	Michael Ireton	1958-62	W
21.	Kevin Ireton	1961-62	W
22.	Kathleen Ireton	1960-62	W
23.	Margaret Klingenterg	1956	W
24.	Kristen Kinkade	1965-66	Unknown

Defendants' Exhibit CQ

	NAME	YEAR	RACE
25.	Caryle Kinkade	1965	Unknown
26.	Roy Kenney	1958-60	B
27.	Debra Kenney	1957-60	B
28.	Cheryl Kenney	1957-60	B
29.	Susan Levin	1962-63	W
30.	Betsy Levin	1962-63	W
31.	Valerie Lefkan	1961-62	W
32.	Richard Lefkan	1957-58	W
33.	Lesley Lefkan	1959	W
34.	Daniel Leary	1960-61	W
35.	Thomas Laneve	1961-62	W
36.	Patricia Laneve	1962-63	W
37.	Mary Laneve	1959-60	W
38.	Joseph Laneve	1960-61	W
39.	Sarah Matre	1958-59	W
40.	Lisa Matre	1959-60	W
41.	Mario Nieto	1962-63	W
42.	Diana Nieto	1962-63	W
43.	Andrea Salerino	1964-66	Unknown
44.	Danny Suttenfield	1959-60	W
45.	Susan Stephens	1962-63	W
46.	Helen Stephens	1958-63	W
47.	Robert Taylor	1958-59	W
48.	Larry Taylor	1958-59	W

DEFENDANTS' EXHIBIT CU

BLACK ENROLLMENT BY SCHOOLS
Dayton Public Schools
October, 1975

School	Total Enrollment 1969-65	1969-70	1970-71	1971-72	1972-73	1973-74	1974-75	1975-76	% Black 1969-65	1969-70	1970-71	1971-72	1972-73	1973-74	1974-75	1975-76
Jane Addams	600	668*	598*	578*	561*	530*	515*	472*	41.6%	78.7%	80.3%	81.7%	76.7%	86.6%	88.9%	90.5%
Allen	574	668	632	629	622	606	566	576	0.6	0.1	0.2	0.6	0.6	2.3	2.1	2.4
Belle Haven	1180	1091	1056	994	871	928	885	876	0.0	5.7	6.8	18.3	17.7	26.6	33.2	39.0
Belmont Elem.	794	635	602	542	556	527	522	520	0.0	0.0	0.0	0.0	9.4	10.4	7.5	9.0
Brown	1177	1130	1075	1067	980	1046	1009	976	0.5	0.8	1.0	1.0	2.2	2.9	2.9	5.4
Carlson	244	626	590	574	519	500*	489*	467*	95.9	99.7	99.8	99.5	99.0	98.4	100.0	99.8
Cleveland	1500	1335	1248	1246	1150	1119	1109	1038	0.0	0.1	0.3	0.3	0.8	0.9	0.6	0.6
Cornell Heights	850	894	955	784	800	767	743	722	0.0	59.1	69.6	72.3	80.5	86.7	88.8	92.7
Drexel	700	679*	692*	601	597	551	563	540	3.5	4.3	5.2	6.5	8.2	9.1	7.6	6.3
Eastmont	950	792	685	607	542	527	470	520	0.0	0.0	0.0	0.0	0.7	0.9	1.1	19.4
Edison	800	532*	513*	645*	681*	525*	692*	593	80.0	98.3	98.8	99.7	99.7	99.2	99.9	99.3
Emerson	1000	992*	939*	816*	749*	685*	567*	520*	0.0	13.6	11.8	5.6	8.0	10.1	12.2	10.6
Fairport	780	877	867	841	748	778	878	866	0.0	4.6	9.7	39.7	59.1	78.1	85.2	89.3
Fairview Elem.	667	811	808	741	734	753	758	679	1.0	3.7	4.3	7.4	14.6	22.2	25.3	31.8
Ft. McKinley	510	473	448	451	425	---	---	---	0.0	2.5	9.6	1.6	3.6	---	---	---
Franklin	691	862	854*	632	584	560	565	520	0.0	0.0	0.0	0.0	0.3	0.4	0.5	0.0
Gardendale	176	782*	506*	553*	554*	519*	532*	504*	7.9	43.3	71.9	72.3	78.9	80.0	82.7	83.9
Gettysburg	630	632	593	598	576	609	590	558	0.0	6.6	9.4	14.5	22.7	37.4	51.2	57.7
Grant	917	699	653	649	610	552	533	475	0.0	0.9	0.6	0.6	0.3	0.7	0.6	0.6
Grace A. Greene	715	555*	551*	579*	653*	338*	---	---	89.5	97.5	96.7	96.5	96.2	100.0	---	---
Hawthorne	316	763	285*	329*	275*	267*	---	---	0.0	0.0	0.0	30.1	28.0	33.2	---	---
Hickorydale	565	487	488	432	471	513	521	520	0.0	10.3	8.2	15.5	32.5	44.2	54.1	61.9
Highview	807	812*	718	710*	635*	554*	440*	355*	82.0	98.2	98.1	97.9	96.7	96.0	94.3	93.5
Huffman	834	1027	1007*	859*	775*	722*	662*	638*	0.9	3.4	3.2	0.1	0.1	0.3	0.3	0.6
Irving	1035	749*	700*	780*	636*	525*	399*	382*	96.6	100.0	99.7	99.5	99.2	99.8	99.2	99.0
Jackson Prim.	537	707*	617*	677*	630*	596*	547*	485*	96.2	99.2	99.4	99.1	99.7	99.5	99.8	99.2
Jackson Elem.	1147	785	778	726	692	607	551	506	98.5	99.5	99.5	99.4	99.9	99.7	99.3	99.2
Jefferson Prim.	---	661	628	319	724*	735*	668*	693*	---	72.0	83.3	88.0	93.5	94.7	96.4	97.5
Jefferson Elem.	1296	841	806	860	807	720	688	590	1.2	80.3	73.2	91.3	94.9	96.1	96.1	96.9
Kemp	725	631	612	568	515	452	467	472	0.0	0.0	0.0	7.2	7.0	7.5	8.1	8.5
Lexton	600	543	507	471	451	-18	422	393	0.0	0.0	0.0	0.4	5.8	10.0	8.1	6.4
Lincoln	1145	1019	977	966	885	866	863	775	0.0	0.2	0.3	1.0	0.6	0.1	0.2	0.5
Longfellow	850	991	935*	838	875	826	758	739	5.8	50.2	53.9	60.7	64.1	69.9	72.2	74.6
Loos	785	719	697	631	606	633	639	592	1.9	5.0	9.5	6.0	5.8	5.2	6.7	8.1
Macfarlane	1279	1222*	1149*	921	772	658	633	527	99.6	99.9	99.8	99.5	99.6	100.0	100.0	99.8
Horace Mann	435	355	333	284	255	236	218	249	0.0	7.0	11.1	0.7	3.1	5.5	4.1	27.3

School	Total Enrollment 1969-70	1970-71	1971-72	1972-73	1973-74	1974-75	1975-76	% Black 1969-70	1970-71	1971-72	1972-73	1973-74	1974-75	1975-76
McCaffey	858	904*	830*	774*	662*	620*	629*	18.9%	24.3%	32.0%	41.6%	47.9%	55.1%	[illegible]
McKare	498	456*	423*	409*	413*	410*	360*	98.8	100.0	100.0	100.0	100.0	100.0	[illegible]
Meadowdale Elem.	671	587	522	508	754	706	691	12.8	7.7	8.2	12.6	12.3	10.6	[illegible]
Mount Chapel	722	687	681*	610*	395*	380*	500*	99.6	99.6	99.7	100.0	99.8	100.0	[illegible]
Patterson Elem.**	603	621*	619*	726*	659*	586*	563*	0.0	0.0	0.0	0.3	4.8	3.8	[illegible]
Residence Ph. Trlr.	383	464	449	437	411	359	342	---	99.5	98.9	99.8	100.0	99.5	[illegible]
Residence Ph. Elem.	746	764	702	660	654	592	536	80.0	99.2	99.7	99.7	99.8	99.5	[illegible]
Ruskin	927*	870*	834*	756*	733*	741*	716*	0.0	4.3	3.7	9.1	8.5	8.1	[illegible]
Shiloh	645	619	550	537	548	486	442	2.4	6.0	7.4	8.9	8.4	14.2	[illegible]
Snoup Mill	336	296	207	184	---	---	---	0.9	13.4	13.9	1.4	3.8	---	---
Louise Troy	724*	691*	592	567	530	504	467	99.8	99.7	99.9	99.7	99.1	100.0	[illegible]
Valerie	483	450	342	373	452	442	415	---	17.4	20.0	13.5	24.0	30.2	[illegible]
Van Cleve	780	813*	760*	756*	634*	887*	842*	0.9	1.7	2.1	14.9	20.2	19.6	[illegible]
Washington	703*	681*	634*	628*	575*	576*	536*	23.0	16.6	16.4	14.5	15.3	15.5	[illegible]
Weaver	1118*	1027*	1001*	838*	605*	524*	457*	98.8	100.0	99.9	99.7	99.5	100.0	99.6
Webster	537	486	493	502	527	551	547	0.1	0.6	0.4	0.4	1.0	1.3	5.6
Westwood	1467*	1409*	1318*	1190*	1008*	955*	877*	96.7	99.3	99.6	99.5	99.7	99.5	99.5
Whittier	801*	688*	748	615	576	535	408	95.6	99.3	99.0	99.5	99.3	99.7	99.4
Wagaman	1034*	985*	988*	971*	967*	963*	916*	100.0	100.0	99.5	99.8	100.0	100.0	100.0
Orville Wright	758	719	963	929	935	870	781	0.0	0.8	0.4	6.7	8.1	8.2	6.9
Carmen	108	104	101	85	85	86	112*	15.6	17.6	16.3	11.9	11.8	10.4	14.0
Kennedy**	181	169*	153	---	---	---	---	13.8	11.0	12.4	15.7	---	---	---
Home Teaching	---	---	---	---	---	---	24	---	---	---	---	---	---	---
Belmont M.S.	2003	1966	2039	2036	2020	2096	2256	0.0	0.5	1.2	2.7	5.2	5.3	6.8
Bunker	1471	1333	1369	1357	1012	990	1283	92.7	99.4	99.8	100.0	100.0	99.8	99.8
Fairview M.S.	1396	1353	1426	1426	1421	1365	1471	0.9	9.3	12.7	19.1	24.1	35.0	43.2
Kiser	744	727	731	773	739	688	880	2.7	5.4	4.8	6.4	9.8	16.1	13.5
Meadowdale M.S.	1750	1783	1828	1866	1986	2145	2033	0.0	1.4	2.9	5.2	10.6	23.7	33.7
Patterson Bldg.	1659	1756	1764	1737	1236	1297	1371	1.8	22.2	29.8	31.0	32.9	36.9	40.8
Roosevelt	1703	1727	1691	1539	1393	1148	---	94.5	99.8	100.0	99.9	100.0	100.0	100.0
Roth	1291	1143	1191	1183	1068	1071	1204	53.5	94.8	97.8	96.5	95.8	96.3	98.8
Stivers Bldg.	1074	1224	1267	1216	1217	1184	1268	2.6	3.9	10.8	12.3	14.8	29.7	44.2
Colonel White	1741	1693	1727	1561	1549	1245	1330	1.1	28.9	42.1	45.9	52.6	60.0	60.7
Wilbur Wright	1332	1319	1350	1397	1571	1593	1590	3.3	4.2	4.7	5.5	9.2	12.2	12.0
Totals (Inc. Pre-K)	37,977	38,287*	36,595*	35,041*	32,162*	29,028*	27,031*	45,181*	31.1	38.1	40.6	42.7	45.6	46.3	47.5	48.9
Totals (exc. Pre-K)					30,798	27,683	25,733	44,165					43.6	45.4	46.5	48.3

* Includes Pre-School in building
** 1972-73, 1973-74, 1974-75, 1975-76 figures listed for Patterson Elem. include both Patterson and Kennedy

Division of Research
Department of Management Services

JOINT EXHIBIT I

Statement to the Board of Education, August, 1968, by Wayne M. Carle, Superintendent of Schools

STEPS TOWARD GOALS OF INTENT

One year ago this month the Board adopted a Statement of Intent for the purpose of restating its past practice and present intentions "in matters having to do with its role in the harmonious development and creative growth of the total community."

The preamble to this statement was as follows:

> "What the best and wisest parent wants for his own child, that must the community want for all its children; therefore, optimum educational opportunities for academic and vocational excellence shall be provided for every child.
>
> "Every reasonable and constructive measure that can be effected will be taken for the ultimate elimination of racial imbalance in our schools.
>
> "Recognizing the need for additional and special educational programs for children and parents from culturally deprived neighborhoods, the Board will be particularly sensitive and willing to experiment in such areas."

The statement then set forth five specific objectives which the Board resolved to implement.

I became aware of this statement last spring and immediately recognized it as a most significant affirmation of a board of education's concern for the major educational problems confronting an increasingly urbanized nation. I know of few boards that had spoken as directly and forthrightly to the challenges confronting it.

By their actions, predecessors of this Board also have been concerned with racial balance. With respect to the West

Side, for example, records indicate the determination, in the early 'fifties, to attempt to reduce the concentration of minority-group pupils in the then three schools with predominantly Negro enrollments – Wogaman, Garfield and Willard – by transferring parts of these districts and integrating other schools. The subsequent large increase in nonwhite enrollments in the surrounding schools, however, finally negated this effort.

When the first Ohio Civil Rights Commission survey was made several years ago, I recall that the Dayton schools were leaders in the employment of Negro teachers in the State. Thus, this is not a community that has been insensitive to the changing needs and demands of the urban center.

On this first anniversary of the Board's statement, I should like to report briefly on some of the many steps that have been taken toward the major purposes to which you pointed twelve months ago. Permit me to relate them directly to the five objectives.

1. The Board of Education will seek to achieve a more nearly balanced racial composition within the areas served by its schools.

- Open enrollment in all Summer high school centers was inaugurated in 1968, extending the various open enrollment plans in elementary and other summer programs.
- Nine receiving schools will be more racially balanced with children from Edison and Jefferson schools, where fire and enrollment growth have necessitated transportation to other classrooms.

2. Selection, recruitment, assignment, or appointment of teachers and administrators will be on merit only.

- Of the 319 teachers employed by mid-August to begin the 1968-69 school year, 29 percent are Negro (27% of the teaching staff was clasified as Negro in the 1967 federal survey).

- Among these new teachers, 40 Negro teachers have been assigned to schools with predominantly white enrollments and 64 white teachers are assigned to schools with predominantly Negro enrollments.
- With the opening of the school year, the number of Negro principals will have increased from 10 to 14 since last year and the number of Negro assistant principals will increase from 6 to 15, including schools in the North and East sections of the city which will have Negro administrators for the first time. One-fourth of the administrators of schools are now Negro.
- Internships have been arranged this summer with universities to encourage promising Negroes to qualify for administrative assignments.

3. Curriculum material shall be used which emphasize the creative and positive contributions made by the various ethnic groups which make up the American people.

- In addition to books, records and films in use in the past three years, orders have been placed this summer for 12,648 copies of books on Negro history and biography; 40 sets of multi-media materials; 23 encyclopedias, 280 picture sets and 20 filmstrips representative of recently produced materials in this field.
- The Board has adopted new history textbooks for fifth, eighth and eleventh grades that better reflect the contributions of American ethnic minorities.
- A Negro History Committee is working on identification of new materials, informing schools about them, and evaluating their use in the schools.
- Workshops are planned for the coming year to prepare leadership teams from each school to help teachers become acquainted with, and use more effectively, the new materials.

4. The Board shall encourage teachers, administrators, and schools to promote dialogue and creative engagement among the varied ethnic and cultural facets of our system.

- 226 teachers of disadvantaged youth in grades 7 to 12 participated last spring in two programs for the improvement of teaching skills in the Roth, Roosevelt and Dunbar areas.
- Six summer workshops for Dayton teachers emphasized the improvement of skills for teaching in inner-city schools.
- A Learning Disabilities Workshop provided staff members with new insights to meet special needs of children.
- SPEAR, Head Start and Summer School teachers all have attended orientation and succeeding training meetings to improve skills in working with culturally different children.
- The Multiple Motivation Project in Dayton View was funded as a national model for advancing change in education and started last spring as a program to strengthen education and neighborhood stability amid integration.
- Multiple Motivation provided a summer workshop in human relations training for teachers, administrators and community members.
- Follow-up workshops are planned this coming year to train staff leaders to assist schools staffs in problems related to social change.

5. This Board shall actively engage with all governmental, social and community agencies which aim at implementing the policies above.

- In recent months the board has –

  Created a Citizens Advisory Council

  Established continuing liaison with the Assembly of Area Councils

  Met with a committee of the City Commission on city-school cooperation and planned a joint meeting of the full Board and Commission in September.

- During the past year representatives of the schools assisted in developing the proposal for Dayton's Model Cities grant, and a teacher consultant has been working with the Model Cities Planning Council in developing an educational component for the forthcoming plans for this area of the city.

The developments since the Board's statement have indeed been numerous and significant. I have not included the very major developments in services to inner-city schools made possible through the new State funds for Improving the Educational Status of Disadvantaged Pupils, and of the creative way in which the Dayton schools have merged these projects with federally assisted programs. You have had summaries of these programs in recent meetings.

The Board has set forth very high goals for the development of optimum educational opportunities, the reduction of racial isolation, and the provision of programs targeted to the special needs of urban children. They are goals that are worthy of continued effort by every teacher and administrator and of the understanding and support of all citizens.

STATEMENT OF INTENT:

The tenor of our times prompts the Board of Education to restate in simple terms its past practice and present intention in matters having to do with its role in the harmonious development and creative growth of the total community. For the above reasons this statement of intent is issued:

A. What the best and wisest parent wants for his own child, that must the community want for all its chil-

dren; therefore, optimum educational opportunities for academic and vocational excellence shall be provided for every child.

B. Every reasonable and constructive measure that can be affected will be taken for the ultimate elimination of racial imbalance in our schools.

C. Recognizing the need for additional and special educational programs for children and parents from culturally deprived neighborhoods, the Board will be particularly sensitive and willing to experiment in such areas.

THEREFORE, BE IT RESOLVED:

1. The Board of Education will seek to achieve a more nearly balanced racial composition within the areas served by its schools.
2. Selection, recruitment, assignment, or appointment of teachers/administrators will be on merit only.
3. Curriculum material (textbooks, films, teaching aids) shall be used which emphasize the creative and positive contributions made by the various ethnic groups which make up the American People.
4. The Board shall encourage teachers, administrators, and schools to promote dialogue and creative engagement among the varied ethnic and cultural facets of our system.
5. This Board shall actively engage with all governmental, social, and community agencies which aim at implementing the policies stated above.

JOINT EXHIBIT II

DAYTON BOARD POSITION PAPER

The members of the Dayton School Board agree that there are certain matters concerning the school system which should be spelled out to the public before the electorate votes on November 3, 1970.

1. Each member of the Board regards the 8.5 mill levy as absolutely necessary for the financial health of the Dayton School System.
2. If the 8.5 mill levy is passed, Dayton School District will be offering no new programs from the general fund during the life of the current Board (December 31, 1971).
3. Proposed new programs to be financed from special state or federal funds will be scrutinized closely.
4. If the 8.5 mill levy passes, the increased revenue will provide a 5% increase of available funds from the current tax base over the 1970 budget. Such an increase is less than the current rate of inflation.
5. If the levy fails, schools will remain open for the remainder of 1970 if the Dayton School System receives the $1.4 million advance from the State Foundation and, if the Clerk-Treasurer is permitted to spend encumbered funds.

   It should be noted that the Board has requested that the State Auditor perform the "audit" necessary to ascertain the date in 1970, if any, when the schools will close.
6. The Board understands that without passage of the 8.5 mill levy, the school system at the end of 1971 will be approximately $15 million short of funds at the current rate of expenditure.

Joint Exhibit II

7. The Board has in the past, and plans to continue in the future, to seek a revision of the state tax system to provide additional state funding for schools.

8. The Board has inquired from the county treasurer as to when an additional 8.5 mills voted on November 3 would appear on voters' tax bills. The first payment is due in March, 1971.

In addition to the above eight points which deal primarily with finance, the Board agrees on the following four points:

1. There will be no forced busing during the term of administration of the current School Board unless it is so ordered by lawful authority.

2. It is understood that the Pod System is an administrative devise and is not for the purpose of moving pupils from the neighborhood school.

3. It is agreed that freedom of enrollment in schools will be continued and that magnet schools (i.e., Patterson Co-op Vocational High School) will be continued.

4. The Board policy is that there will be no more administrators in 1971 than there were at the end of 1969.

Note: Comparable figures are as follows:

National average ..... 4.1% of total general operating budget
Regional average ..... 4.2% of total general operating budget
Dayton District average 2.8% of total general operating budget

• • •

Attorney General Opinion No. 6810

OPINIONS

6810

1. SCHOOL DISTRICTS–SECTION 3317.14 R.C.–DISTRIBUTION OF STATE FUNDS–DISTRICTS HAVE NOT "CONFORMED WITH THE LAW"–"LAW" EMBRACES ALL RULES AND PRINCIPLES ENFORCED AND SANCTIONED BY GOVERNING POWER–INCLUDES EQUAL PROTECTION PROVISION OF FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHICH FORBIDS SEGREGATION ACCORDING TO RACE.

2. DISTRIBUTION OF STATE AND FEDERAL FUNDS TO PUBLIC SCHOOL DISTRICTS–STATE BOARD OF EDUCATION PRIMARILY RESPONSIBLE FOR ADMINISTERING LAWS RELATING TO–SUBJECT TO APPROVAL OF STATE CONTROLLING BOARD.

3. STATE BOARD OF EDUCATION–PRIMARY DUTY TO DETERMINE WHETHER SCHOOL DISTRICT OR BOARD OF EDUCATION "HAS NOT CONFORMED WITH THE LAW"–SHOULD OBSERVE REQUIREMENTS OF ADMINISTRATIVE PROCEDURE ACT, CHAPTER 119, R.C.

4. FUNDS MAY BE DISTRIBUTED TO SCHOOL DISTRICT WHICH "HAS NOT CONFORMED WITH THE LAW" BY ORDER OF STATE BOARD OF EDUCATION AND STATE CONTROLLING BOARD–ACTING SEPARATELY–FOR "GOOD AND SUFFICIENT REASON" ESTABLISHED TO SATISFACTION OF EACH BOARD.

SYLLABUS:

1. The term "law" as used in Section 3317.14 Revised Code, forbidding the distribution of state funds to school

districts which have not "conformed with the law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.

2. The primary responsibility for administering the laws relating to the distribution of state and Federal funds to the several public school districts is placed with the state board of education, subject to the approval of the state controlling board.

3. It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, "has not conformed with the law" so as to require the withholding of state funds from such district. In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119, Revised Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally.

4. Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds to such district notwithstanding such lack of conformity with the law.

Columbus, Ohio, July 9, 1956

Mr. R. M. Eyman, Executive Secretary, State Board of Education
State Office Building, Columbus, Ohio

Dear Sir:

I have for consideration your request for my opinion in which the following questions are presented:

> "1) Does the term 'the law and the rules and regulations pursuant thereto' in said Section of the Revised Code (Section 3317.14) refer to all the statutes, decisions and constitutional provisions relating to schools, or to the Foundation Law only, or otherwise?
>
> "2) By what procedure may the state board of education and the state controlling board determine whether a local board of education 'has not conformed with the law'?
>
> "3) In determining whether good and sufficient reason for non-conformance has been established to [do] the state board of education and the state controlling board act separately or as a unit?
>
> "4) In making such determination, what, if any, investigative and hearing powers does the state board of education have; what rules of evidence must be followed; and what degree of proof is required?"

As to your first question, a provision is found in existing Section 3317.14, Revised Code, for the withholding of state funds in the case of certain school districts as follows:

> "A school district, the board of education of *which has not conformed with the law* and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by sections 3317.02, 3317.04, and 3317.12 of the Revised Code, except for good and sufficient reason established to the satisfaction of the

superintendent of public instruction and the state controlling board. * * *" (Emphasis added.)

Effective October 1, 1956, an amended provision, analogous to that above, will become effective as follows:

> "A school district, the board of education of which *has not conformed with the law* and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by section 3317.02 of the Revised Code, except for good and sufficient reason established to the satisfaction of the state board of education and the state controlling board. * * *"
>
> (Emphasis added.)

The use of the article "the" in this statute is suggestive, but only faintly so, of the idea that reference is made to a particular legislative enactment. However, it will be seen that there is not the slightest suggestion in the context of this provision which would aid in identifying any such particular enactment.

Moreover, it is to be observed that the article "the" was inserted in the statute in the course of the 1953 codification, the prior analogous provision in Section 4848-6, General Code, reading as follows:

> "A school district, the board of education of which has not conformed with *all the requirements of law* and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by the provisions of sections 4848-1, 4848-3 and 4848-9 of the General Code, except for good and sufficient reason established to the satisfaction of the superintendent of public instruction and the state controlling board; * * *."
>
> (Emphasis added.)

It thus becomes clear, because of the legislative purpose, clearly expressed in Section 1.24, Revised Code, not to effect substantive changes in the recodification process, that the provision here in question, to the extent that the point is pertinent, must be read as though the article "the" had not been inserted as an incident of such recodification.

In Cyclopedic Law Dictionary, Third Edition, on the definition of the term "law" it is said:

> "A distinction is to be observed in the outset between the abstract and the concrete meaning of the word. In the broadest sense which it bears when used in the abstract law, it is the science which treats of the theory of government.
>
> "In a stricter sense, but still in the abstract, it is the aggregate of those rules and principles enforced and sanctioned by the governing power in a community, and according to which it regulates, limits, and protects the conduct of members of the community. In the abstract sense, it includes the decisions of the courts."

In the same work the use of a prefixed article is mentioned as follows:

> "Used without an article prefixed, the abstract sense is generally intended; with an article, the sense is usually concrete."

Applying this rule to the case at hand, and giving consideration to the circumstance that the context in which the term is used in Section 3317.14, Revised Code, gives no hint as to the identity of a particular statute to which reference might be intended, it becomes necessary to conclude that the term "law" as used in that section is used in the abstract meaning of the word.

Because the provision in question relates to the "requirements of law," or conformity therewith, it is clear the term is not here used in such a broad abstract sense as to include

the "science which treats of the theory of government," but rather that it is used in the somewhat stricter sense which embraces "the aggregate of those rules and principles enforced and sanctioned by the governing power in a community" and that it "includes the decisions of courts."

Although not set out in your inquiry in express terms, there is latent therein the question of whether the conformity with law provision in Section 3317.14, Revised Code, is sufficient in scope to include instances of segregation of pupils in school according to race.

In the 14th Amendment of the Constitution of the United States there is this provision:

> "• • • No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In Article VI of the Constitution of the United States there is this provision:

> "• • • This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. • • •"

It is quite clear that these provisions are such as to be comprehended in the term "law" in the sense in which I have indicated such term is used in Section 3317.14, supra, and where there is a denial of "equal protection of the laws" there is an instance of not having "conformed with the requirements of law" or of not having "conformed with the law" as provided in that section.

The equal protection clause above quoted was the subject of

consideration in Brown v. Board of Education, 347 U. S., 483, 98 L. Ed. 873, the headnotes in the latter report of the decision being in part as follows:

> "5. The equal protection clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools, even though the physical facilities and other tangible factors, such as curricula and qualifications and salaries of teachers, may be equal."

In the opinion of the court, delivered by Mr. Chief Justice Warren, there is the following statement:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

This decision is the unanimous pronouncement of the highest court in the land and must be regarded as dispositive of the question of the illegality of racial segregation in the public schools of this state.

It follows, therefore, that in those cases in which your board finds as a matter of fact that racial segregation exists in a particular school district the restrictive provisions of Section 3317.14, Revised Code, must be deemed to apply.

As to the question of your board and the controlling board acting jointly or separately, it is first to be observed that the action of the two boards, in approving distribution of funds notwithstanding a failure to conform with the law, is called for only *after* it is determined that a particular district or board "has not conformed with the law."

Because the state board of education is given the authority and responsibility in Section 3301.07, Revised Code, to "ad-

minister and supervise the allocation and distribution of all state and federal funds," and because, in Section 3317.01, Revised Code, it is provided that "Sections 3317.01 to 3317.15, inclusive, of the Revised Code, *shall be administered by the state board of education*, with the approval of the controlling board," I conclude that the responsibility to ascertain whether in particular cases there is a lack of conformity with law is placed in the first instance with the state board of education.

In this connection, although the controlling board's approval is required in the administration of Sections 3317.01 to 3317.15, Revised Code, it is to be noted that the board's principal function is one in the field of fiscal management and accountability, whereas it is the duty of the state board of education to "administer" the laws relating generally to the operation of the schools, is provided with a departmental staff for the purpose, and is provided with extensive investigative powers as hereinafter pointed out.

Accordingly, until such an initial determination is made, the question of joint or separate action, under Section 3317.14, Revised Code, to distribute funds notwithstanding such failure, is purely academic.

I may observe in passing, however, that I perceive no language in the statute which in any way suggests joint action of such boards, and the fact that each is a separate entity, separately created by law, would clearly indicate the necessity of separate action.

As to the procedure by which your board may reach a determination as to a failure to conform to the law in particular cases, your attention is invited to the following provision in Section 3301.13, Revised Code:

> "• • • In the exercise of any of its functions or powers, including the power to make rules and regulations and to prescribe minimum standards, the department of education and any officer or agency therein, shall be subject to the provisions of chapter 119. of the Revised Code. • • •"

Because one of the functions or powers of the state board of education is to ascertain whether a failure to conform to law has occurred, it is clear that in such a proceeding the provisions of Chapter 119., Revised Code, will apply. Set out in that chapter are detailed procedures for holding hearings, summoning witnesses, receiving evidence, making adjudication orders, and for appeals from such orders by any person "adversely affected."

As to the rules of evidence to be followed and the degree of proof required, your attention is invited to the following provision in Section 119.12, Revised Code:

> "The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by *reliable, probative, and substantial evidence* and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by *reliable, probative, and substantial evidence* and is in accordance with law."
>
> (Emphasis added.)

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. The term "law" as used in Section 3317.14, Revised Code, forbidding the distribution of state funds to school districts which have not "conformed with the law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.

2. The primary responsibility for administering the laws relating to the distribution of state and federal funds to the

several public school districts is placed with the state board of education, subject to the approval of the state controlling board.

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4. Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds to such district notwithstanding such lack of conformity with the law.

Respectfully,

C. William O'Neill
Attorney General

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

MARK BRINKMAN, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

PRELIMINARY STATEMENT

Petitioners predicate their application for certiorari on hyperbole and erroneous *dictum* about this case in *Columbus Board of Education* v. *Penick*, 47 U.S.L.W. 3089 (U.S. Aug. 11, 1978) (Rehnquist, J., in Chambers). The truth of the matter is that petitioners seek the substantial overruling of, at least, *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); and *Green* v. *County School Bd.*, 391 U.S. 430 (1968).

In its careful and comprehensive opinion in *Brinkman* v. *Gilligan*, 6th Cir. No. 78-3060 (July 27, 1978) (*Brinkman IV*) (Pet. App. 189a-217a), the court below engaged in a straightforward application, to largely undisputed

evidence, of *Keyes; Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976); *Swann; Green; Brown* v. *Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (*Brown I*). The court of appeals concluded that plaintiffs had overwhelmingly proved their case that, as of the time of initial trial, the Dayton public schools had long been and still were intentionally segregated by race on a systemwide basis necessitating a systemwide remedy. The court found that the district court's contrary findings were not supported by the evidence but instead were clearly erroneous. While acknowledging that the Dayton schools, unlike their "southern" counterparts, were not segregated by state statutory and constitutional law, the court below found that the evidence unmistakeably showed that deliberately segregative policies and practices of Dayton school authorities had accomplished the same system of racially dual schooling as the "southern" segregation laws. Accordingly, the court held petitioners to the remedial obligations imposed by the "southern" cases (e.g., *Swann* and *Green*) and made binding on such *de jure* segregated systems by *Keyes*. A fair reading of the court of appeals' opinion reveals nothing more. The writ of certiorari should therefore be refused.

COUNTERSTATEMENT OF QUESTION PRESENTED

The issue in this case always has been and is:

> Whether the systemwide racial segregation of pupils in the Dayton public schools existing at the time of initial trial was caused by the intentionally segregative policies and practices of the Dayton Board of Education?

COUNTERSTATEMENT OF THE CASE

The Relevant Opinions

In its June 27, 1977, opinion in this case, *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406 (1977), this Court focused on the "proper allocation of functions between the district courts and the courts of appeals within the federal judicial system" (*id.* at 409), rather than review the entire record evidence of racial discrimination in order to determine its legal significance. For purposes of its analysis, the Court accepted the limited and ambiguous findings of the district court, which the Court determined related only to optional zones for three high schools, a violation "only with respect to high school districting." *Id.* at 413. Recognizing the as yet not fully reviewed but extensive record evidence of alleged intentional segregation, the Court noted that "this is not to say that the last word has been spoken as to the correctness of the District Court's findings as to unconstitutionally segregative actions on the part of the" Dayton Board. *Id.* at 418. The Court therefore remanded to the district court "for the making of more specific findings" (*id.* at 419), but directed the systemwide plan to remain in operation in order to permit appropriate judicial review by the district court and the court of appeals. *Id.* at 421.

In arriving at this result, the Court was critical of the ambiguity and lack of specificity in the previous findings and conclusions of the district court (*id.* at 412-13, 419); and the Court was even more critical of the limited appellate review accorded by the court of appeals in its previous opinions, which "neither" held "that the findings of the District Court [were] clearly erroneous" nor "that the District Court . . . misapprehended the law." *Id.* at 417-18. Thus, the Court noted that the court of appeals in *Brinkman I* (503 F.2d 683 (6th Cir. 1974)) "did discuss at length what it described as 'serious questions' as to

whether Board conduct relating to staff assignment, school construction, grade structure and reorganization, and transfers and transportation, should have been included" in the violation determination, but that in reserving decision on these issues the court of appeals had "neither upset the factual findings of the District Court nor . . . reversed the District Court's conclusions of law." *Id.* at 416. The Court also noted that *Brinkman I* "considered at somewhat greater length than had the District Court both the historical instances of alleged racial discrimination by the Dayton School Board and the circumstances surrounding the Board's [more recent desegregation] resolutions and the subsequent rescission of those resolutions." *Id.* at 415-16. But "this consideration was in a purely descriptive vein: no findings of fact made by the District Court were reversed as having been clearly erroneous, and the Court of Appeals engaged in no fact-finding of its own based on evidence adduced before the District Court." *Id.* at 416.

Pursuant to this Court's mandate, the court of appeals remanded the case to the district court for further proceedings. 561 F.2d 652 (6th Cir. 1977). The District Court conducted an additional evidentiary hearing and, on December 15, 1977, issued its "Findings of Fact and Conclusions of Law." Pet. App. 142a-88a. The District Court began its opinion by correctly noting: "The course of this protracted litigation has been marked by conceptual differences not only as to the facts, but as to the legal significance of those facts." Pet. App. 143a. The court then proceeded to perpetuate the dichotomy by making clearly erroneous fact findings, applying the wrong legal standards for intent and causation, and misallocating the burdens of proof. The court resolved all ultimate factual issues against plaintiffs in argumentative fashion and conclusory terms; subsidiary findings on many important factual issues were omitted entirely or were ambiguous. The facts were compartmentalized into rigid

categories, and each category was analyzed in isolation from the record as a whole. In the many instances in which it would have been a palpable falsehood to hold even that plaintiffs had failed to prove subjective racial animus on the part of the school authorities, the court refused to find racial intent at all, holding instead that such pervasive actions had "no incremental segregative effect" (*e.g.*, Pet. App. 154a), or that plaintiffs "failed to meet the remedial portion of their burden of proof." *E.g.*, Pet. App. 149a. The district court thus concluded that there were no constitutional violations requiring correction and dismissed the complaint in its entirety. Pet. App. 188a.

Obedient to this Court's mandate in *Dayton*, the court of appeals fully reviewed (for the first time) all major factual and legal disputes between the parties. *Brinkman IV*, *supra*, Pet. App. 189a-217a. The court reversed all aspects of the district court's judgment. The court found that the trial judge had both misapprehended and misapplied the law. *See, e.g.*, Pet. App. 192a, 194a, 199a-205a, 210a-211a, 214a-16a. Moreover, as a review of Chief Judge Phillips' careful and thoughtful opinion reveals, calm scrutiny of the record evidence convinced the court of appeals that the trial court's dispositive findings of both subsidiary and ultimate fact were not just the by-products of fundamental legal blunders, they were also clearly erroneous standing alone. *See, e.g.*, Pet. App. 194a, 196a, 199a, 202a, 210a, 211a, 211a-12a, 213a. That critical, sustained look at the record, combined with the reasoned application of settled law, caused the court of appeals to reach the following conclusions: at the time *Brown I* was decided the Dayton Board was operating an explicitly dual school *system* (Pet. App. 194a-205a); that thereafter the Board, instead of dismantling the across-the-board impact of its deliberately segregative policies, intentionally continued, compounded, perpetuated and expanded the dual system so that, at the time of initial trial in 1972, the *entire* system was *de jure* segre-

gated (Pet. App. 195a-96a, 197a-200a, 206a-14a); that the only meaningful remedy for this intentional systemwide segregation is a plan of systemwide desegregation.[1] Pet. App. 214a-17a. Accordingly, the court of appeals ordered continuation of the systemwide desegregation plan which has been in operation since September 1976. Pet. App. 217a.

The Facts

Between 1912 and 1951-52, the Dayton Board devised and carried out a number of racially discriminatory policies and practices which both mistreated black students and faculty and caused them to be confined to segregated black schools; concomitantly, white teachers and pupils received favored treatment, and they were accommodated in reciprocally-maintained segregated white schools. These policies and practices included:

- the humiliating operation of all-black classrooms within, and in an outbuilding in back of, the Garfield school; the refusal to allow black students to attend white classes at Garfield, and the ultimate overnight conversion of Garfield into an officially-designated blacks-only school;
- the racially dual policy of *never* allowing black teachers to teach white pupils, always assigning such teachers only to all-black classes and/or schools, accompanied by "free transfer" policies to keep all nearby white pupils and all white teachers out of blacks-only classes and schools;
- the overnight conversions, in response to a growing black population, of Willard and Wogamon schools into official blacks-only schools and the concomitant transfer of white students and teachers out of these designated black schools;
- the construction and operation on a city-wide basis of Dunbar as a blacks-only high school with, of course, an all-black staff, accompanied by pupil-assignment and counselling techniques designed to channel black students into Dunbar;
- cooperation by contract with public housing authorities to have children educated on a completely segregated basis in public housing space officially and explicitly earmarked according to race;
- the transportation of black orphanage children past white schools across town to the blacks-only schools;
- a variety of within-school racially discriminatory practices—requiring black children to sit in the back of the class, not letting them participate in "white" activities (e.g., being an angel in a school play), segregated athletic competition, segregated showers, locker rooms and swimming pools, and the like—which further branded black people as unfit for association with whites in the public schools.

These facts, and supporting citations to the undisputed record, are detailed in the appendix hereto, pp. 2a-10a, *infra*, and the court of appeals found the facts essentially as set forth above, Pet. App. 195a-201a.

By 1951-52, the last year before *Brown* for which pupil racial data were made available by the Board, about 54% of the black children and *all* of the black teachers were

[1] The court of appeals properly performed its normal appellate function to review the evidence and factual findings pursuant to the "clearly erroneous" standard of Rule 52(a), Fed.R.Civ.P., as enunciated for school cases by this Court's decision in *Dayton*, 433 U.S. at 409-10, 417-18. This Court, of course, normally "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In the event, however, that any member of this Court wishes to evaluate the contrasts between the court of appeals' exposition of record evidence and that of the district court, we attach as an appendix to this brief a detailed comparison of the largely undisputed facts with the district court's opinion. That comparison demonstrates that the trial court's opinion is incredible, and that Chief Judge Phillips' opinion for the court of appeals is sound beyond doubt.

in the four official blacks-only schools; 83% of the white children were in virtually all-white (90% or more) schools taught entirely by white teachers. It was not against the law for blacks and whites to go to school together in Dayton, but it clearly was the official educational policy that learning in all of the public schools should take place on a racially segregated or otherwise racially discriminatory basis.[2] At the time of *Brown* the Dayton Board was operating a dual school system. Pet. App. 201a-205a.

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[2] From 1951-52 through the time of *Brown*, the "explicit segregation policy" (Pet. App. 195a) was "effectively continued in practice" (Pet. App. 196a) by the Board, although in somewhat different garb in view of the continuing protests from the black community. For example, the Board adopted a "new but equally unacceptable policy" (Pet. App. 195a n.11) for teacher assignment that told black teachers they could teach white children only if white parents were willing, and told white teachers not to worry, that they would *not* be assigned against their will to black schools. *Id.* Simultaneously, the Board added black portions of the attendance areas of the three blacks-only elementary schools to the adjacent "mixed" schools (which already had substantial black enrollments); the Board unmistakably converted these adjacent schools into "colored" schools by (a) creating intentionally segregative optional zones (Pet. App. 209) in the white residential areas of these adjacent schools (as a substitute for the former "free transfer" policy) to allow whites to avoid these newly designated blacks-only schools; and (b) the traditional means for earmarking schools according to race (Pet. App. 196a-197a), i.e., the assignment of black teachers for the first time to these adjacent schools but *not* to the white schools of the system. *See also* pp. 11a-12a, *infra*. Pursuant to the Board's intentionally segregative policies with respect to school construction and site selection (Pet. App. 210a-212a), the Board built a new elementary school on the same site as a blacks-only public housing project and assigned a virtually all-black student body and staff (Pet. App. 195a-196a). *See also* pp. 11a-12a, *infra*. And the Board, of course, maintained Dunbar as a city-wide blacks-only high school with respect to both students and staff. Pet. App. 200a. As of the time of *Brown*, then three-fourths of all black pupils in Dayton attended these schools officially designated by the Board for blacks-only, and an even greater percentage of white students attended virtually all-white schools. *See* pp. 9a-10a, 15a-17a, *infra*.

In the post-*Brown* era the Board perpetuated and expanded the segregated system it had created. The racially dual faculty policy continued in raw form and substantial practice until HEW intervention in 1969 resulted in an agreement requiring faculty desegregation over a two-year period; but even under that agreement remnants of the old policy were still present at the time of trial. Pet. App. 195a-96a, 206a-07a; pp. 18a-21a, *infra*. The Board expanded the use of optional attendance zones—which had their race-oriented origins as a substitute for the "free transfer" policies previously used to "protect" whites from the designated black schools (*see* note 2, *supra*)—into a number of new areas which had substantial segregative impact. Pet. App. 209a-10a; pp. 23a-27a, *infra*. In addition, the Board resorted to a variety of other deviations from "geographic zoning" or the "neighborhood school" concept—grade reorganization; curriculum, hardship and disciplinary transfers; tuition assignments; "intact" busing; and Freedom of Enrollment transfers—virtually whenever the need arose for perpetuation of the segregated system. Pet. App. 212a-13a; pp. 34a-39a, *infra*. The Board's brick-and-mortar practices had an even more devastating segregative impact. Almost without exception, under the Board's intentionally segregative policies all new schools and additions to existing schools were constructed on a uniracial basis, literally sealing up the dual system extant at the time of *Brown*. Pet. App. 210a-12a; pp. 30a-32a, *infra*. One of the more blatant examples of official racial discrimination in the areas of school construction, location and utilization involves the events attending the "closing" of the old blacks-only Dunbar High School in 1962: the old Dunbar building was converted into an elementary school (renamed McFarlane) with attendance boundaries drawn to take in most of the black students previously attending the blacks-only Willard and Garfield schools, which were simultaneously closed; McFarlane opened with an all-

black faculty and an all-black pupil population; at the same time, the Board constructed a new Dunbar High School, located in a black neighborhood far from white residential areas, opened with a virtually all-black student body and faculty. Pet. App. 207a, 210a-12a; pp. 31a-32a, *infra*. All in all, of 24 new schools constructed between 1950 and the time of trial, 22 opened 90% or more black or 90% or more white; 78 of some 86 additions of regular classroom space were made to schools 90% or more one race at the time of expansion (only 9 additions were made to schools less than 90% black or white); and, the intentionally segregative nature of these practices was highlighted by the coordinate assignment of staffs to these new schools and additions tailored to the racial composition of the pupils. Pet. App. 210a; p. 31a, *infra*. These policies and practices were supplemented by segregative grade structure reorganization and creation of five middle schools. Pet. App. 212a-13a; pp. 34a-35a, *infra*. This history culminated with the 1972 rescission of a 1971 Board-adopted plan of systemwide desegregation; the rescission undid operative administrative action to dismantle the dual system and reimposed segregation on a system-wide basis. *See* pp. 40a-44a, *infra*.

The Board was operating a dual system at the time of trial. Pet. App. 213a-14a. This intentional segregation extended throughout the system, and could only be eradicated by an across-the-board plan of desegregation. Pet. App. 214a-17a.

REASONS FOR DENYING CERTIORARI

The petition for certiorari is understandably long on rhetoric and short on substance. The only reason this case has been around for so long is because plaintiffs-respondents have heretofore been unable to obtain a full review by the court of appeals of the district court's mishandling of the case. In its 1977 opinion, this Court

directed a cure for that defect, and the court of appeals has obeyed that directive. As the sound opinion below demonstrates, it is the *facts* which prevent petitioners from winning this case, and no amount of inflated discourse (Pet. 8, *et seq.*) about the use of "legal presumptions of intent to extrapolate system-wide violations from . . . 'isolated' instances," *Columbus Bd. of Educ.* v. *Penick*, 47 U.S.L.W. 3089, 3090 (Aug. 11, 1978) (Rehnquist, J., in Chambers), can change this conclusion. Because one member of this Court already has been induced into a misreading of the opinion below, however, we respond to each of the arguments advanced by petitioners in support of certiorari.

1. The Board argues that the court below attached pivotal significance to the situation extant in 1954, and that it penalized the Board in the present for isolated discrimination of the distant past for which, petitioners imply, the Board long ago repented. Pet. 9-10. In contrast, as we have shown in the Statement of the Case, pp. 6-8, *supra*, and as revealed in detail in the opinion below, the pre-1954 acts of discrimination were not mere anecdotes: they were systemic in nature, they directly segregated three-fourths of the pupils and virtually all of the teachers pursuant to explicit policies of apartheid, and they infected the entire system with the message of official racial discrimination. The court of appeals held that these facts, virtually all of them undisputed, constituted a dual school system in Dayton at the time of the *Brown I* decision and that thereafter the Board was under the same constitutional duty to eradicate all vestiges of state-imposed segregation which *Brown II* and its progeny imposed upon Dayton's "southern" counterparts. Pet. App. 194a-205a. If *Keyes* (which held that the case for finding a "northern" dual system could be made out on the basis of inferences drawn from intentionally segregative conduct affecting a considerably smaller portion of the system than that involved here)

means anything, it means that the court of appeals merely applied settled precedent in making this determination.

But neither plaintiffs' case nor the court of appeals' opinion stopped here. The court below was explicitly cognizant of its duty to determine the degree of intentional segregation in the Dayton system *at the time of trial*. *See* Pet. App. 205a-14a. The court of appeals did not close its eyes with the last page of the pre-*Brown* record; it did not leap from the 1954 facts to a present-day systemwide remedy. Rather, the court looked to the past for the simple reason that, in Justice Jackson's words, "present events have roots in the past, and it is quite proper to trace currently questioned conduct backwards to illuminate its connections and meanings." *United States* v. *Oregon State Med. Soc.*, 343 U.S. 326, 332 (1952). This is what *Keyes* (413 U.S. at 211-12) and *Swann* (402 U.S. at 20-21, 28) are all about. The pre-*Brown* record in this case was resorted to by the court of appeals only because "it illuminates or explains the present and predicts the shape of things to come." *United States* v. *Oregon State Med. Soc.*, *supra*, 343 U.S. at 333. With that understanding, the court reviewed the evidence of what happened in Dayton following *Brown* and found only one permissible conclusion: the Board effectively continued its explicit policy of segregation to perpetuate and augment the dual system right up to the time of trial. Pet. App. 205a-214a. There is, therefore, no merit to petitioners' contention that "historical background . . . [was] transmogrified into a determinative focus in order to produce a desired result through artificial presumptions and shifting burdens." Pet. 10.

2. The Board argues, in a related fashion, that the court of appeals misapprehended the legal significance of the *Brown* violation. Pet. 11-13. This argument is based almost entirely on the Board's description of its pre-*Brown* conduct as consisting only of "isolated and long-abandoned segregative practices. . . ." Pet. 12. As we

have shown, and as the court of appeals held, this description is invalid; the Board's intentionally segregative pre-*Brown* policies extended to all reaches of the school system. The evidence of systemwide intentional segregation—a dual system resulting from practices of the Board implementing its explicit policy of segregation—is overwhelming. As the Attorney General told the Court when this case was last here: "This case presents as clear an example of pervasive discrimination prior to *Brown* as the Court is likely to find in a State in which discrimination was not required by statute." Brief Amicus Curiae for the United States at 23. It is these overpowering facts, not the use of reasonable presumptions, which compel the judgment below. In the face of these facts the Board could not and did not present any evidence to rebut the conclusion that the Board operated a dual school system in 1954.[3] The court of appeals' decision was no more than a literal application of *Keyes*.[4]

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[3] Without citation to any opinion below or any part of record, petitioners nevertheless make the naked assertion that "the record contains evidence indicating that the distribution of students that existed in the system when suit was filed would have been the same even if every action of the Board in the last seventy-eight years had been racially neutral by 1978 standards." Pet. 13. One need only review the specific acts of systemwide discrimination detailed in the court of appeals' opinion to recognize the absurdity of the argument that the segregation in the Dayton schools at the time of *Brown* adventitiously came about. Petitioners have not come forward with one bit of credible evidence showing that any school in the system in 1954 was *not* infected by the Board's pervasive policies of intentional segregation.

[4] It is thus difficult to comprehend the Board's assertions that the court below "rendered 'effect' synonymous with 'intent' insofar as determining constitutional violations is concerned." Pet. 11; *see also id.* at 12. The court did no such thing. The court's holding that "at the time of *Brown I*, defendants were *intentionally* operating a dual school system . . ." (Pet. App. 194a (emphasis added)), was based on the numerous repeated, undenied and system-wide policies of intentional segregation reflected by the record.

3. Petitioners next argue that the court of appeals "premised its findings of segregative intent upon a presumption of segregative purpose arising from a natural, probable and foreseeable result test." Pet. 14. This also is inaccurate. While the court did make passing reference to the so-called "natural, probable and foreseeable result" test (Pet. App. 203a-04a),[5] the court's judgment rests independently and firmly on the direct record evidence of explicit discrimination. This is not a case in which any part of the judgment is based on circumstantial evidence alone. The court found as fact that the Board operated a dual system in 1954 and that thereafter the Board intentionally expanded that system (Pet. App. 213a):

> Upon consideration of the record, the conclusion is inescapable that, rather than eradicate the systemwide effects of the dual system extant at the time of *Brown I*, defendants' racially motivated policies with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization perpetuated or increased public school segregation in Dayton. Thus, defendants have utterly failed to comply with their ongoing 24 year obligation to desegregate the Dayton public schools . . . and, in addition, have committed affirmative

[5] The presumption of segregative intent arising from school board actions that naturally, probably and foreseeably result in segregated schools is evidentiary only and is rebuttable upon a showing that such segregation stems from the consistent application of racially neutral policies. The test has been utilized by every circuit that has considered the question in light of *Keyes*, *Washington* v. *Davis*, *Arlington Heights* and *Dayton*. *See, e.g.*, *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir. 1978); *United States* v. *Board of School Comm'rs of Indianapolis*, —— F.2d —— (7th Cir. 1978); *United States* v. *School Dist. of Omaha*, 565 F.2d 127 (8th Cir. 1977) (*en banc*), *cert. denied*, —— U.S. —— (1978); *United States* v. *Texas Educ. Agency*, 564 F.2d 162 (5th Cir. 1977), *rehearing denied*, 579 F.2d 910 (5th Cir. 1978); *NAACP* v. *Lansing Bd. of Educ.*, 559 F.2d 1042 (6th Cir.), *cert. denied*, —— U.S. —— (1977).

> acts that have exacerbated the existing racial segregation.

4. Finally, petitioners argue (Pet. 15-20) that the court of appeals imposed a systemwide remedy without properly determining the "incremental segregative effect" of the Board's constitutional violations. The quoted phrase has become a talismanic cry for the Dayton Board in its efforts to justify the current segregation without regard for its causes and the Board's choice not to come forward with any affirmative evidence to show that its systemwide segregative purpose has had lesser impact than intended. In assessing the appropriate scope of remedy, however, the court of appeals correctly understood its precise duty under the decisions of this Court. "The purpose of the remedy," said the court, "is to eliminate the lingering effects of intentional constitutional violations and to restore plaintiffs to substantially the position they would have occupied in the absence of these violations." Pet. App. 214a. Petitioners do not contend, nor could they, that this is not the law.

What really aggrieves petitioners, then, is the refusal of the court below to approve, in the teeth of the systemwide violation found, the "two errors [committed by the district court] in its approach to this inquiry." Pet. App. 215a. The first error corrected by the court of appeals was the fact that, contrary to the explicit holding in *Keyes*,[6] the district court "individually examined each alleged constitutional violation as if it were an isolated occurrence and sought to determine the incremental segregative effect of that occurrence." The second error—"allocating the burden of proof on the issue of incremental segregative effect to plaintiffs, requiring them to establish both racial discrimination and the specific in-

[6] "We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system." 413 U.S. at 200.

cremental effect of that discrimination" (Pet. App. 216a) —also was correctly found by the court to be in conflict with *Keyes*' explicit holding that the wrongdoer bears the burden of proving that his illegal conduct caused no harm, or caused less harm than intended. *See* 413 U.S. at 211 n.17, 213-14.[7] Petitioners were given the opportunity to show that their systemwide violations had less than systemwide impact, but the court found that they had not made such a showing. Pet. App. 216a-17a. And the Board's petition for review here similarly fails to identify a single school which the Board suggests has not been affected by its systematic policies of racial discrimination. Throughout this litigation we have challenged petitioners to come forward with such proof, but they have knowingly declined the challenge, preferring instead to take an all-or-nothing approach in the hope that this Court will abandon precedent and require plaintiffs to shoulder the burden of proving each specific element of constitutional injury at each school at each moment in time. Petitioners have the right to select this tactic, but, having so elected, petitioners' refusal to submit evidence and argument on their remedial burden should not redound to their benefit.

Unless the Court is inclined to overrule prior decisions, the petition for certiorari herein presents no issue worthy of review.

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[7] This is the ordinary rule. *See, e.g., Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 286-87 (1977); *Arlington Heights*, 429 U.S. at 270-71 n.21; *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 771-73 (1976); *Ford Motor Co.* v. *United States*, 405 U.S. 562, 575 (1972)); *Swann*, 402 U.S. at 26; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-25 (1969); *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Paper Co.* v. *Paterson Paper Co.*, 282 U.S. 555 (1931).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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APPENDIX

APPENDIX

The Dayton School District: General Geography and Demography

As reflected in the report (A.106-07)[1] of the Master previously appointed by the district court, the city of Dayton has a population of 245,000 and is located in the east-central part of Montgomery County in the southwestern part of the State of Ohio, approximately 50 miles due north of Cincinnati. The Dayton school district is not coterminus with the city; some parts of the school district include portions of three surrounding townships and one village, while some portions of the city are included in the school district of three adjacent townships. The total population residing within the Dayton school district boundaries is 268,000; the school pupil population is 45,000, about 50% of whom are black. Prior to implementation of the desegregation plan now in effect, the vast majority of black and white pupils had separately attended schools either virtually all-white or all-black in their pupil racial composition. *E.g.*, A.25-26; S.Ct.A.311-

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[1] *Appendix Citations.* "A.—" citations are to the Appendix filed in the court of appeals, which consists of four photocopied volumes (I-IV) of consecutively paginated materials (pp. 1-1128) (numbered in the bottom right-hand corner of each page) specifically designated for this appeal, cited herein in the form "A.000," and one printed volume (V) (which is the exhibit volume of the appendix used in this Court when the case was last here) paginated 311-606, which is cited herein in the form "S.Ct.A.000." (A few relevant documents are contained in the Appendices to Plaintiffs-Appellants' Motion For Stay and Injunction Pending Appeal, filed in the court below, which will be referred to as "Stay App.")

Original Record Citations. Plaintiffs' trial exhibits are designated in the form "PX——" and defendants' trial exhibits in the form "DX——." Original transcript citations are in the following forms: "R.I. 000" refers to the 20-volume transcript of the November 1972 trial; "R.II. 000" to the February 1975 remedial hearing; "R.III. 000" to the December 1975/January 1976 remedial hearing; and "R.IV 000" to the 4-volume transcript of the November 1977 remand hearing.

315 (PX 2A-2E), 502-506 (PX 100A-100E), 588-589 (DXCU).

The Dayton District is bisected on a north/south line by the Great Miami River. Historically, the black population has been concentrated in the south-central and southwest parts of the city, primarily on the west side of the Miami River and south of the east-west Wolf Creek. *See* S.Ct.A.577-79 (1940, 1950 and 1960 census tract maps). The black population continues to be concentrated in the southwest quadrant, but there is now also a substantial black population in the northwest quadrant across Wolf Creek. Extreme northwest Dayton and most of the city east of the Miami River are and have been heavily white in residential racial composition. *See* S.Ct.A.580 (1970 census tract map).

Geographically and topographically there are no major obstacles to complete desegregation of the Dayton school district. A.61. The Master determined that where pupil transportation is necessary, the maximum travel time would be about twenty minutes. A.108. As found by the Board's experts, due to the compact nature of the system, "the relative closeness of the Dayton Schools makes long-haul transportation[,] an issue in many cities[,] moot here." R.III. 111.

The Pre-Brown Dual System

In 1887 the state of Ohio repealed its school segregation law and attempted to legislate the abolition of separate schools for white and black children. 85 Ohio Laws 34. That statute was sustained the following year by the Supreme Court of Ohio. *Board of Education* v. *State*, 45 Ohio St. 555, 16 N.E. 373 (1888). The laudable goals of that legislation were not attained in Dayton until implementation of the desegregation plan now in effect at the start of the 1976-77 school year.

The facts of racial segregation in the Dayton public schools, as revealed by the record before the Court, begin in 1912.[2] In that year school authorities assigned Louise Troy, a black teacher, to a class of all-black pupils just inside the rear door of the Garfield school; all other classes in this brick building were occupied by white pupils and white teachers. About five years later, four black teachers and all of the black pupils at Garfield were assigned to a four-room frame house located in the back of the brick Garfield school building with its all-white classes. Shortly thereafter, a two-room portable was added to the black "annex" making six black classrooms and six black teachers located in the shadow of the white Garfield school. A four-room "permanent" structure was later substituted (about 1921 or 1922), and eight black teachers were thus assigned to the eight all-black classrooms in the Garfield annex. A.320-25.[3]

About 1925 school authorities learned that two black children, Robert Reese and his sister, had been attending the Central school under a false address, even though they

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[2] Many of the facts set forth in this Appendix were admitted by all Dayton Board defendants in their responses to plaintiffs' pre-trial Requests for Admissions, served on October 13, 1972. The Superintendent and three Board members filed responses separate from those of the Board and its four "majority" members. *See* A.109-38. These facts were also the subject of extensive and largely uncontroverted evidence at trial.

[3] In 1917 the black classes in the black annex at Garfield contained about 50 black children per room. A.322. Thereafter, Mrs. Ella Lowrey, a black teacher for several decades in the Dayton system, taught a class of 42 black children when white teachers inside the brick building had classes of only 20 white pupils. A.325-26.

Mrs. Lowrey's service began in 1916 and continued through 1963, with several years' interruption at various times. In her words, "doing 40 years service in all in Dayton, . . . I never taught a white child in all that time. I was always in black schools, black children, with black teachers." A.333. (At one time during this early history prior to 1931, one black teacher, Maude Walker, taught an ungraded class of black boys at the Weaver school. All other black teachers in the system were assigned to the black annex at Garfield. A.259.)

lived near the Garfield school. They had accomplished this subterfuge by walking across a bridge over the Miami River. A.281.[4] The Reese children were ordered by school authorities to return to the Garfield school, but their father refused to send them to the black Garfield annex. Instead, he filed a lawsuit in state court seeking a writ of mandamus to compel Dayton school authorities to admit children of the Negro race to public schools on equal terms with white children. A.280-83. In a decision entered of record on December 24, 1925, the Court of Appeals of Ohio denied a demurrer to the mandamus petition. This decision was affirmed by the Ohio Supreme Court and Dayton school authorities were specifically reminded that state law prohibited distinctions in public schooling on the basis of race. *Board of Education of School District of City of Dayton* v. *State ex rel. Reese*, 114 Ohio St. 188, 151 N.E. 39 (1926).

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[4] During this time, there apparently were some other black children also in "mixed" schools. For example, Mrs. Phyllis Greer attended "mixed" classes at Roosevelt high school for three years prior to 1933. A.252-53. But even when they were allowed to attend so-called "mixed" schools, black children were subjected to humiliating discriminatory experiences within school. At Roosevelt, for example, black children were not allowed to go into the swimming pool and blacks had separate showers while Mrs. Greer was there (A.253); while Robert Reese was at Roosevelt, there were racially separate locker rooms and blacks were allowed to use the swimming pool, but not on the same day whites used it. A.284. At Steele High School, black children were not allowed to use the pool at all during this period. A.886-87. Even in the "mixed" classrooms black children could not escape the official determination that they were inferior beings because of the color of their skin. Mrs. Greer vividly remembers, for example, "when I went to an eighth grade social studies class I was told by a teacher, whose name I still remember, . . . that even though I was a good student I was not to sit in front of the class because most of the colored kids sat in the back." A.254. And she remembers with equal clarity that, while in the second grade at Weaver, she "tried out for a Christmas play and my teacher wanted me to take the part of an angel and the teacher who was in charge of the play indicated that I could not be an angel . . . because there were no colored angels." A.251.

Following this state court decision Robert Reese and a few of his black classmates were allowed to attend school in the brick Garfield building, but the black annex and the white brick building were otherwise maintained. Black children were allowed to attend classes in the brick building only if they asserted themselves and specifically so requested. A.327-28. Otherwise, they "were assigned to the black teachers in the black annex and the black classes." A.328.[5]

The black pupil population continued to grow at Garfield, and another black teacher was hired and assigned with an all-black class placed at the rear door of the brick building. A.328-29. In 1932 or 1933, Mrs. Lowrey (*see* note 3, p. 3a, *supra*), was also placed in the brick building, again with an all-black class "in a little cubby-hole upstairs," making ten black teachers with ten black classes at Garfield. A.329-31. Finally, around 1935-36, after most of the white children had transferred out of Garfield, school authorities transferred all the remaining white teachers and pupils in the brick building to other schools and assigned an all-black faculty and student body to Garfield. A.260-61, 329-31; S.Ct.A.524 (PX 150 I); PX 155 (faculty directories).[6]

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[5] During the pendency of the Reese case, the eight black teachers assigned to the Garfield annex were employed on a day-to-day basis because school authorities did not know whether the black teachers were going to be in the Dayton system after the lawsuit. Black teachers would not be needed if the courts required the elimination of all-black classes, since the Board deemed black teachers unfit to teach white children under any circumstances. A.326-27.

[6] Throughout this period and until 1954, black children from a mixed orphanage, Shawen Acres, were assigned across town to the black classes in the black Garfield school, while the white orphan children were assigned to nearby white classes and white schools. A.215-16, 250, 1034, 1036-37. This practice was terminated following the *Brown* decision in 1954 at a time when the black community in Dayton was putting pressure on the school administration to stop mistreating black children. S.Ct.A.483 (PX 28).

But the black pupil population was growing during these years, and even the conversion of Garfield into a blacks-only school was not sufficient to accommodate the growth. So, with the state court decision in the *Reese* case now eight years old, the Dayton Board converted the Willard school into a black school. The conversion process was as degrading and stigmatizing as had been the creation and maintenance of the Garfield annex and the ultimate conversion of the brick Garfield into a black school. In the 1934-35 school year, six black teachers (who were only allowed to teach black pupils) and ten white teachers had been assigned to the Willard school. In September of 1935, all white teachers and pupils were transferred to other schools, and Willard became another school for black teachers and black pupils only. A.260-61; S.Ct. A.524 (PX 150 I); PX 155 (faculty directories).

At about this same time, the new Dunbar school, with grades 7-9, opened with an all-black staff and an all-black student body. S.Ct.A.524 (PX 150 I).[7] The Board resolution opening Dunbar stated that grades 7 and 8 were to be discontinued at Willard and Garfield[8] and "that attendance at the . . . Dunbar School be optional for all junior high school students of the 7th, 8th, and 9th grade levels in the city." A.429; S.Ct.A.539 (PX 161A). Of course, this meant only all *black* junior high students, since Dunbar had an all-black staff who were not permitted by Board policy to teach white children. A.260, 429; PX 155 (faculty directories).

[7] Mr. Lloyd Lewis, who was present at its inauguration, testified that the Dunbar school "was purposely put there to be all black the same as the one in Indianapolis [the Crispus Attucks school, *see United States* v. *Board of School Comm'rs*, 332 F. Supp. 655, 665 (S.D. Ind. 1971)] that I had left." A.546, 1048-50, 1083-86. Dunbar was also excluded from competition in the city athletic league until the late 1940's, thereby requiring Dunbar teams to travel long distances to compete with other black schools, even those located outside the state. A.254, 297-98, 316.

[8] These two black elementary schools served grades 7 and 8, whereas the system prior to 1940 was otherwise generally organized on a K-6, 7-9, 10-12 grade-structure basis. A.811.

Within a very short time, grades 10, 11 and 12 were added to the black Dunbar school. Then in 1942, just two years after the Dayton school authorities had reorganized to a K-8, 9-12 grade structure, the Board again assigned the seventh grades from the all-black Willard and Garfield schools to the all-black Dunbar school. A.429; S.Ct.A.520 (PX 161B). Black children from both the far northwest and northeast sections of the school district traveled across town past many all-white schools to the Dunbar school. A.268, 478-79, 632-33. Many white children throughout the west side of Dayton were assigned to Roosevelt high school past or away from the closer but all-black Dunbar high school.[9] Although some black children were allowed to attend Roosevelt, those who became "behavior problems" were transferred to Dunbar. A.255-56. And other black children from various elementary

[9] Prior to 1940, no high schools had attendance boundaries. A.824. The black Dunbar school was located in close proximity to the Roosevelt high school which, although it always had space, apparently had too many black children. Along with Steele and Stivers, these high schools were located roughly in the center of the city and served high school students throughout the city. (In addition, the Parker school had been a city-wide single-grade school which served ninth graders. A.855-56. In 1940 attendance boundaries were drawn for the high schools with the exception of Dunbar and a technical school (whoe name varied), both of which long thereafter remained as city-wide schools. *See* p. 25a n.20, *infra*, and accompanying text.

Dunbar continued until 1962 as a city-wide all-black high school. In that year the Dunbar building was converted into an elementary school (renamed McFarlane) with attendance boundaries drawn to take in most of the students previously attending the all-black Willard and Garfield schools, which were simultaneously closed. McFarlane opened with an all-black faculty and all-black pupil population. At the same time, a newly-constructed Dunbar high school opened with both assigned faculty and students over 90% black. S.Ct.A.315 (PX 2E), 316 (PX 4), 508 (PX 130C); A.139-42 (PX 3), 574-75.

schools were either assigned, channeled, or encouraged to attend the black Dunbar high school. A.547-49; R.I. 573.[10]

Even these segregative devices were not sufficient to contain the growing black population. So between 1943 and 1945, the Board, by way of the same gross method utilized to convert the Willard school into a black school, transformed the Wogaman school into a school officially designated unfit for whites. White pupils residing in the Wogaman attendance zone were transferred by bus to other schools, to which all-white staffs were assigned. By September 1945 the Board assigned a black principal and an all-black faculty with an all-black student population to the Wogaman school. A.255, 298; S.Ct.A.524 (PX 150 I); PX 155 (faculty directories).

Still other official devices were used to keep blacks segregated in the public schools. One such device, resorted to regularly during the 1940's and early 1950's, was to cooperate with and supplement the discriminatory activities of Dayton public housing authorities. Throughout this period, racially-designated public housing projects were constructed and expanded in Dayton. A.194-95, 198-203; S.Ct.A.510 (PX 143 B). In 1942, the Board transferred the black students residing in the black De-Soto Bass public housing project to the Wogaman school (S.Ct.A.540 (PX 161 B)), and a later overflow to the all-black Willard school, rather than other schools that

[10] The most effective means of forcing black children to attend the blacks-only Dunbar, of course, was the psychological one of branding them unsuited for association with white children. *See* note 4, *supra*. As Mr. Reese testified, he "chose" Dunbar over Roosevelt after suffering the humiliation of being assigned to separate locker rooms, separate showers, and separate swimming pools at Roosevelt: "I wanted to be free. I felt more at home at Dunbar than I did at Roosevelt . . . You couldn't segregate me at Dunbar." A.284. Similarly, Mrs. Greer testified: "I went to Dunbar because I felt that if there was going to be—if we were going to be separated by anything, we might as well be separated by an entire building as to be separated by practices." A.253.

were equally close (A.257-58), while transferring white students from the white Parkside public housing project to the McGuffey and Webster schools and the eighth grades from those schools to the virtually all-white Kiser school. S.Ct.A.540. Then in the late 1940's and early 1950's, the Board leased space in white and black public housing projects for classroom purposes, and assigned students and teachers on a uniracial basis to the leased space so as to mirror the racial composition of the public housing projects. A.202-03; S.Ct.A.513-23 (PX 143 J).

By the 1951-52 school year (the last year prior to 1964 for which enrollment data by race is available), the Dayton Board was operating what any informed person would immediately recognize as a dual school system. During that year there were 35,000 pupils enrolled in the Dayton district, 19% of whom were black. There were four all-black schools, officially designated as such: Willard, Wogaman, Garfield and Dunbar. These schools had all-black faculties and (with one exception, an assignment made that school year) *no* black teachers taught in any other schools. A.139 (PX 3). In addition, there were 22 white schools with all-white faculties and all-white student bodies. And there was an additional set of 23 so-called "mixed" schools, 7 of which had less than 10 black pupils and only 11 of which had black pupil populations greater than 10% (ranging from 16% to 68%). S.Ct.A.506 (PX 100E). These latter schools were generally located in the area surrounding the location of the four designated all-back schools. These few schools with substantial racial mix, however, were marked by patterns of racially segregative and discriminatory practices within the schools, and, with the one exception noted above, none had any black teachers. Eighty-three percent of all white pupils attended schools that were 90% or more white in their pupil racial composition. Of the 6,628 black pupils in the system, 3,602 (or 54%) attended the four all-black schools with all-black staffs; and another 1,227 (or

19%) of the system's black pupils were assigned to the adjacent schools which were about to be converted into "black" schools (*see* note 11, *infra*, and accompanying text). Thus, 73% of all black students attended schools already or soon to be designated "black." S.Ct.A.312 (PX 2B), 506 (PX 100E).

[*DISTRICT COURT'S OPINION*

(Pet. App. 147a-49a, 151a-52a, 153a, 158a-59a, 169a-71a)

The subsidiary facts set forth above are not in dispute. Many of them are the subject of findings below, and while others (*e.g.*, the *Reese* litigation, the conversion of Garfield, Willard and Wogaman into blacks-only schools, and the specifics of the Board's entanglement with public housing discrimination) were ignored by the district court, the district court's opinion does not conflict with these undisputed facts. Thus, the district court finds that "public housing was strictly segregated according to race" (Pet.App. 147a-48a); that the Board segregated many black children and discriminated against the few others who attended predominantly white schools in accordance with "an inexcusable history of mistreatment of black students" (Pet.App. 149a); that "until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative" (Pet.App. 153a); that the discriminatory transfer of black children from Shawen Acres Orphanage to the blacks-only Garfield School was "arguably . . . a purposeful segregative act" (Pet.App. 159a);* and that "the first Dunbar High School was intended to be and was in fact a black high school." Pet.App. 170a. To the extent that the court's failures to mention some of the other uncontradicted facts set forth above might be read as adverse findings on these points, then such findings are clearly erroneous. But the district court's principal error is its refusal to view the facts set forth above in the

aggregate (rather than pepper them throughout the opinion as though they were each unrelated to the other) and conclude that the Board was operating a basically dual school system. That conclusion is compelled by these facts; the court's refusal to draw that conclusion was clearly erroneous.**]

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* To the extent that the phrasing of this finding might be read to imply that these facts "arguably" do *not* show purposeful segregation, the implication is plainly erroneous. The only facts and conclusions permissible on the record are those set forth in note 6, p. 5a, *supra*.

** The court's conclusions about the post-*Brown* history of Dunbar high school (Pet. App. 170a-71a) which are inconsistent with those set forth in note 9, p. 7, *supra*, at dealt with at pp. 31a-32a, *infra*.

In December 1952 the Dayton Board confronted its last pre-*Brown* opportunity to correct the officially-imposed school segregation then extant. Instead, the Board acted in a manner that literally cemented in the dual system and promised racially discriminatory public schooling for generations to come. What the Board did is referred to in the record as the West-Side reorganization, and it involved a series of interlocking segregative maneuvers.

At this time, the Board was under pressure, as its records reflect, from "the resistance of some parents to sending their children to school in their district because it is an all negro [*sic*] school." S.Ct.A.499 (PX 75). In response, the Board constructed a new all-black school (Miami Chapel) located near the all-black Wogaman school and adjacent to the black DeSoto Bass public housing project; Miami Chapel opened in 1953 with an all-black student body and an 85% black faculty. S.Ct.A.316 (PX 4). The Board altered attendance boundaries so that some of the children in the four blacks-only schools were reassigned to the four surrounding schools with the next

highest black pupil populations; and, through either attendance boundary alterations or the creation of optional zones, it reassigned white students from these mixed schools to the next ring of whiter schools. A.589-91, 609-24, 732-34; PX 123.[11] And the Board began to assign black teachers to these formally mixed schools, thereby confirming their identification as schools for blacks rather than whites. A.613-14, 139-42 (PX 3).

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[11] The boundaries of the black Garfield and Wogaman schools were retracted, thereby assigning substantial numbers of black children to the immediately adjacent ring of "mixed" schools with the highest percentage of black pupils: Jackson (already 36% black in the 1951-52 school year), Weaver (68% black), Edison (43% black), and Irving (47% black). S.Ct.A.506 (PX 100E).

Jackson and Edison were re-zoned to include more black students, and their outer boundaries were effectively contracted through the creation of "optional zones" (Jackson/Westwood and Edison/Jefferson) so that white residential areas became effectively detached from Jackson and Edison and, for all practical purposes, attached to the next adjacent ring of "whiter" schools. Thus, the Board brought blacks in one end and allowed whites to escape out the other in these "transition" schools. The Board also created optional zones (Willard/Irving, Willard/Whittier and Wogaman/Highview, as well as an option between the new Miami Chapel and Whittier) in white residential areas contained within the boundaries of the original four schools for blacks only, so that whites could continue to transfer out of these all-black schools. A.589-91, 609-24. Prior to 1952 whites had been freely allowed to transfer to "whiter" schools, but such transfers were abolished in 1952. A.618; S.Ct.A.482 (PX 28). Optional zones were thus substituted for the prior segregative transfer practice. (The optional-zone technique is discussed in greater detail at pages 23a-27a, *infra*.)

During this period the Board also created another optional attendance zone affecting Jackson; this zone was instituted in an area of the Jackson zone containing the Veteran's Administration Hospital, and allowed whites to attend Residence Park, which at that time was all-white. A.585-87; S.Ct.A.506 (PX 100E). This option is discussed further at note 22, *infra*. Additionally, the Board during this period created the optional zone between Roosevelt (31.5% black) and Colonel White (100% white A.592-93; S.Ct.A.506 (PX 100E). The immediate and long-range racial significance of this option is discussed in greater detail at pp. 25a-26a, *infra*.

[*DISTRICT COURT'S OPINION*

(Pet.App. 155a-57a)

Incredibly, the district court concluded that the West-Side reorganization "was an experiment in integration" and, inconsistently, that "[i]ts purpose was to enable black students to go to an integrated rather than an all-black school if they chose to do so." Pet.App. 155a. These conclusions are clearly erroneous, arrived at only through the most selective and argumentative reading of the record imaginable. For example, the district court cites the testimony from the latest hearing of former Superintendent Wayne Carle in support of the proposition that the West-Side reorganization was an "experiment in integration." While Dr. Carle's testimony is not absolutely free of ambiguity, taken as a whole it is impossible to characterize his views as being that the events of 1952 were integration-oriented. But the district court does not take the testimony as a whole; rather, the court relies on five pages of the transcript (A.938-42) which the court obviously selected as being most supportive of its desired version of events. The court ignores altogether the very next two pages (A.943-44) in which Dr. Carle emphasizes that "you can't operate part of the system on a segregated basis without signalling that the rest of the system is on a segregated basis" (A.933); "The action that was taken there was that nothing was done to eliminate the segregation that already existed in the three schools whose boundaries were changed" (A.944); and that if the Board had *truly* adopted a policy of *real* desegregation and "that were communicated to the community, I suspect it might have a much different effect than minor boundary changes involving schools that remain all black" (A.944). These points are unassailable, but by ignoring them the district court had just begun to err. These basic errors were compounded three-fold: first, by ignoring further testimony from Dr. Carle pointing

out that a central part of the West-Side reorganization was its use of supportive segregative devices such as assigning black teachers to the schools adjacent to the four blacks-only schools (A.1011-12), accompanied by the creation of optional attendance zones (A.1014-15); second, by concluding that "[t]he events of 25 years ago, I suspect, would not affect any student in school at the moment and might not even have affected his parents" (A.1013) (statement of the court)*; and third, by refusing to allow Dr. Carle to answer the question, "In light of those two factors [assignment of black teachers and creation of optional zones], Dr. Carle, do you have a view as to the intention of the Board insofar as whether or not there was an intention to establish these [schools adjacent to the blacks-only schools] as the next black schools in Dayton" (A.1016). The court refused to allow the testimony (A.1016-17). Thus, the court relies on the testimony of a witness to support a conclusion drawn by the court but with respect to which the court would not allow the witness to testify! The court made other comparable errors in drawing its conclusions about the West-Side reorganization.** Its treatment of this issue, insofar as inconsistent with the facts and conclusions we have set out above, should be disregarded as clearly erroneous.]

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* The court's quoted view seems to be that the only harm in segregation occurs at the time of initial imposition, and that subsequent generations have nothing to complain about—a view that is foreclosed by *Brown*.

** For further example, the court cited Dr. Gordon Foster's testimony for the proposition that the West-Side reorganization was intended as an "experiment in integration . . . to enable black students to go to an integrated rather than an all-black school if they chose to do so." Pet. App. 155a, citing A.625. This is not an accurate representation of Dr. Foster's testimony, but rather a highly selective reading which distorts both the sum and the substance of the record. For the twenty-five previous pages of transcript, Dr. Foster had detailed, as summarized above (*see* note 11 and p. 12a, *supra*), the large numbers and variety of segregative devices utilized by the Dayton Board in the West-Side reorganization. At A.624 Dr. Foster concluded this testimony as follows:

> the effect was clearly one of locking in and freezing this configuration including these schools into an all-black situation.

There can be no mistake as to the objective meaning of this twenty-five pages of testimony, and of Dr. Foster's conclusion, or the objective fact that the Board's actions in this reorganization were intentionally segregative, whatever the Board's *stated* intent.

Thereafter, at A.624-29, the court engaged Dr. Foster in a colloquy ranging from "tipping points" to the "alternatives" to the West-Side reorganization available to the Board. At several points in this colloquy, it is clear that Judge Rubin is not satisfied, for example, when Dr. Foster debunks "tipping points" (A.626-29), or suggests limited actions which the Board might have taken to show that its actual purpose was at least racial nondiscrimination, rather than segregation, in a difficult situation of a school district with a prior history of segregation and a community undergoing racial change. A.626. But what apparently peeved the district judge the most was Dr. Foster's evaluation of the ineffectiveness of even such limited alternatives (which the Board, of course, eschewed in its segregative reorganization) in the context of a dual school system (A. 625, 628-29):

> The problem, as I [perhaps the most experienced and respected professional with respect to accomplishing actual school desegregation in the country] see it in this type of situation, is essentially one of diddling around piecemeal with desegregation instead of attacking the problem wholesale and making clear that you are desegregating the entire system.
>
> * * * *
>
> I think the only secure solution and the only safe solution is to dissestablish a dual structure in the entire system so that whites [who may wish to] flee . . . meet the same situation wherever they go.

Viewing Dr. Foster's testimony as a whole, therefore, the district court engaged in much more than just a clearly erroneous selective reading of the record in suggesting that this expert believed the Board's purpose was integrative rather than segregative; it is also a gross misrepresentation, both of Dr. Foster's opinion and the uncontroverted, objective evidence.

The staff aspect of state-imposed segregation—i.e., assignments of Board employees on a racial basis "pursuant to an explicit segregation policy of the Board,"

Brinkman I, 503 F.2d at 697—also underwent a slight change in policy. Prior to this time, as previously noted, the Board would not allow black teachers to teach white children under any circumstances; black teachers were assigned only to all-black schools, and white teachers were assigned only to white and "mixed" schools. Accordingly, in the 1951-52 school year, the Board substituted a new, but equally demeaning, faculty assignment policy (S.Ct.A.481 (PX 21)):

> The school administration will make every effort to introduce some white teachers in schools in negro [*sic*] areas that are now staffed by negroes [*sic*], but it will not attempt to force white teachers, against their will, into these positions.
>
> The administration will continue to introduce negro [*sic*] teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro [*sic*] teachers.

This faculty policy, incredibly, was contained in a statement of the Superintendent disavowing the existence of segregated schools in the Dayton district.[12]

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[12] In 1954 the Superintendent made a further statement, which included the following: "All elementary schools have definite boundaries and children are obliged to attend the school which serves the area in which they reside. The policy of transfers from one school to another was abolished two years ago when the boundaries of several westside elementary schools were shrunken, permitting a larger number of Negro children to attend mixed schools." S.Ct.A. 482 (PX 28). As we have seen (*see* note 11, *supra*), however, the elimination of free transfers was accomplished by a new device, optional zones, which served the same purpose of allowing whites to avoid attendance at black or substantially black schools.

The Superintendent's 1954 statement also contains the following (S.Ct.A.483):

> About two years ago we announced a policy of attempting to introduce white teachers in our schools having negro [*sic*] population. We have not been too successful in this regard and at the present time have only 8 full or part-time teachers in these situations. There is a reluctance on the part of white teachers to accept assignments in westside schools and up to the present time we have not attempted to use any pressure to force teachers to accept such assignments. The problem of introducing white teachers in negro [*sic*] schools is more difficult than the problem of introducing negro [*sic*] teachers into white situations. There are several all-white schools which in the near future will be ready to receive a negro [*sic*] teacher.

As we shall also show (*see* pp. 18a-21a, *infra*), this race-based assignement of faculty continued for almost two more decades as a primary device for earmarking schools as intended for blacks or whites.

[*DISTRICT COURT'S OPINION*

(Pet.App. 151a-53a)

The district court correctly concluded that "until 1951 Board's policy of hiring and assigning faculty was purposefully segregative." Pet.App. 153a. But the court attempts to ameliorate the harsh racism of the 1951-52 policy change by characterizing it as a "policy of dynamic gradualism" (*id.*) which "was substantially implemented during the 1950's and 1960's." *Id.* at 152a. The policy itself, quoted above, speaks louder and clearer than the district court's ameliorative efforts, which are clearly erroneous. The court also erred in not recognizing the Board's faculty policies as the hallmark of the Dayton-style dual system. (The court's continuing errors, with respect to post-*Brown* faculty-assignment practices, are treated at pp. 18a-21a, *infra*.)]

At the time of the Supreme Court's May 17, 1954 decision in *Brown* v. *Board of Education*, therefore, Dayton school officials were operating a racially dual system of public education. This segregation had not been imposed by state law; indeed, it was operated in open defiance of state law.

[*DISTRICT COURT'S OPINION*:

The district court did not specifically speak to this concluding point, but obviously would have reached the clearly erroneous conclusion that the Board was not operating a basically dual system. The facts and their meaning are as we have described them.]

Continuation of the Dual System After Brown

1. *Faculty and Staff Assignments*

The Board continued to make faculty and staff assignments in accordance with the racially discriminatory policy announced in 1951 (*see* pp. 16a-17a, *supra*) at least through the 1970-71 school year. A.901-03, 909-12, 1006-9, 1010-11, 1060-61, 1099-1112. For example, in the 1968-69 school year, the Board assigned 633 (85%) of the black teachers in the Dayton system to schools 90% or more black in their pupil racial compositions, but only 172 (9%) of the white teachers to such schools. The Board assigned only 72 (9%) of the black teachers to schools which were 90% or more white, but 1,299 (70%) of the white teachers were assigned to such schools. S.Ct.A.320 (PX 5D).

Prior to the 1968-69 school year, the Board maintained teacher applications on a racially separate basis. Once teachers were hired, their records were kept on various racial bases which were used to segregate teachers and schools. Substitute teacher files were color-coded by race and substitutes assigned on a racially dual basis. And the Board restricted the hiring, transfer, and promotion of black teachers primarily to black or "changing" schools while white assignments or transfers to these schools were discouraged. A.223-30, 261-66, 139-42 (PX 3), 337-53, 286-92, 362-66, 368-76, 377-84. Principals, assistant principals, counselors, coaches and other clerical and classified personnel were assigned on an even more strictly segregated basis. A.540-41; S.Ct.A.486 (PX 42). Thus, from at least 1912 through 1968 the assignment of personnel in the Dayton school system fit perfectly the classical mold of state-imposed segregation: such assignments mirrored the racial composition of student bodies at new schools and additions,[13] and continued to correspond to the racial identity of those schools already all-black or in transition.[14] White teachers similarly were assigned in disproportionate numbers to the predominantly white schools.[15] It was therefore possible at any

[13] The Board assigned faculty members to these new schools and additions so as to reflect the pupil racial composition at opening, thereby tailoring them as "black" or "white" in accordance with the Board's policy. A.644, 800; S.Ct.A.316-17 (PX 4).

[14] In the 1963-64 school year, for example, the Board assigned 40 of 43 new full-time black teachers to schools more than 80% black in their racial compositions. S.Ct.A.319 (PX 5A). Although somewhat less obvious, this practice was equally effective in identifying the formerly mixed schools as changing or black by assigning more than token black faculty only to these schools and thereafter assigning increasing numbers of black teachers only to these schools. A.139-42 (PX 3), 234-46, 407. As articulated by Mrs. Greer, a long-time black student, teacher and administrator in the system (*see* note 4, *supra*, p. 4a), the assignment of staff to go along with the neighborhood change was the kind of thing that gave the impression of the schools being designed to be black, because black staff increased as black student bodies increased." A.271. As Board member Leo Lucas put it, race-oriented faculty-assignment practices "manifest the intent of the Board" and have a "spill-over" effect on all aspects of school operation. A.1061.

[15] Thus, for example, in the 1968-69 school year, the Board continued to assign new teachers and transfers according to the following segregation practice (S.Ct.A.319 (PX 5A)):

	Schools with predominantly white student enrollment	Schools with predominantly black student enrollment
Black Teachers	40	95
White Teachers	223	64

[Footnote continued]

time during this period to identify a "black" school or a "white" school anywhere in the Dayton system without reference to the racial composition of pupils.

In November of 1968 the United States Department of Health, Education and Welfare [hereinafter, "HEW"] began an investigation of the Dayton public schools to determine whether official policies and practices with respect to race were in compliance with Title VI of the Civil Rights Act of 1964. By letter of March 17, 1969, the acting Director for the Office of Civil Rights of HEW notified the Dayton Superintendent (and the chief state school officer) that "[a]n analysis of the data obtained during the [compliance] review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff." S.Ct.A.415 (PX 11A). Following this determination the Dayton Board agreed with HEW to desegregate all staff so "that each school staff throughout the district will have a racial composition that reflects the total staff of the district as a whole" (S.Ct.A.416 (PX 11F)), in accodance with the principles set forth in *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). At that time, the Dayton professional staff was approximately 70% white and 30% black; the Board-HEW agreement required complete staff desegregation by September 1971. S.Ct.A.417. Nevertheless, by the time of trial in November 1972, it was still possible to identify many schools as "black schools" or "white schools" solely by the racial pattern of staff assignments.[16]

[15] [Continued]

As the former Superintendent testified, "it is obvious in terms of the new hires and transfers for that year the predominating pattern was the assignment of black teachers to black schools and white teachers to white schools." A.540.

[16] The manner in which the Board's assignment of its professional staff at the high school level, for example, still served to racially identify schools, although considerably less dramatically than prior to the 1971-72 school year, is demonstrated by a table set out in

No non-racial explanation for the Board's long history of assigning faculty and staff on a racial basis is possible.[17] Nor can the impact of this manifestation of state-imposed segregation on student assignment patterns be minimized. While that effect is not precisely measurable, it is so profound that it could not have been eliminated merely by desegregating faculties and staffs.[18] Such racial assignment of staff is also "strong evidence that racial considerations have been permitted to influence the determination of school policies and practices. . . ." *Kelley* v. *Guinn*, 456 F.2d 100, 107 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973).

[*DISTRICT COURT'S OPINION*

(Pet.App. 151a-54a)

The district court conceded that "remnants of the old [explicitly racial] policy [of assigning black teachers only

Brinkman I, 503 F.2d at 698. Moreover, classified personnel (e.g., secretaries, clerks, custodians and cafeteria workers) continued to be assigned on a racially segregated basis. A.541.

[17] School officials, of course, had absolute control over the placement of their employees. Consequently, the Board's historic race-oriented assignments of faculty members intentionally earmarked schools as "black" or "white." A.642-43.

[18] Dr. Robert L. Green, Dean of the Urban College and Professor of Educational Psychology at Michigan State University, described how such faculty-assignment practice "facilitates the pattern of segregation" (A.246) in these terms (A.234):

> When there has been historical practice of placing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentially uni-racial or predominantly black or white.

See also A.642-44, 1061-64, 1099-1112.

to teach black children], such as discouraging black teachers from going to all-white schools. . ., and assigning black substitute teachers to black schools. . ., did continue to appear after 1960," but the court argued that "the [1951-52] policy of dynamic gradualism was substantially implemented during the 1950's and 1960's." Pet.App. 152a. This latter conclusion is not clearly erroneous only if it is read as recognizing that the Board's emphasis was on the gradualism, in the words of its 1951-52 policy (*see* p. 16a, *supra*) of "not attempt[ing] to force white teachers [into black schools], against their will," and of "introduc[ing] negro [*sic*] teachers, gradually, into [white] schools . . . where there is evidence that such communities are ready to accept [them]." The facts set forth above are not disputable, and the district court's effort to set a tone different from those facts is clearly erroneous. Also plainly erroneous is the court's implicit effort to find support for its tone in the fact that "by 1969 the Dayton school system had the most black educators and the second highest percentage (24.4%) of black educators of the twenty largest systems in the State of Ohio." Pet.App. 152a.* Similarly erroneous is the court's finding that "vestiges of the Board's earlier illegal practices were evident until approximately 1963[, b]ut by 1969 all traces of segregation were virtually eliminated." Pet.App. 153a; *but see* notes 15 & 16, pp. 19a-21a, *supra*.**

Finally, the court committed a fundamental error of both logic and fact in failing to recognize the obvious relevance of the Board's race-based faculty policies to the question of the Board's segregative intent with respect to other areas of school administration affecting pupil attendance patterns. Thus, to argue, as the court does, that faculty segregation has no impact because in each instance "the school was already identifiable as being black because of the racial population of the students" (Pet.App. 153a), not only is factually untrue***, but it also fails to give faculty-segregation practices their due

weight of "hav[ing] the clear effect of earmarking schools according to their racial composition." *Keyes*, 413 U.S. at 202. *See, e.g.*, notes 14 & 18, pp. 19a & 21a, *supra*. This "clear effect" may not be quantifiable with mathematical precision, but it is substantial in any realistic sense. The district court's contrary conclusions are clearly erroneous.]

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* This argument is specious. In school systems in almost every state which had explicit segregation laws the proportionate number of black teachers was as substantial as in Dayton. And as in Dayton, the "southern" districts also assigned pupils and teachers to schools, in the words of *Brinkman I*, "pursuant to an explicit segregation policy." 503 F.2d at 697. Thus, the presence of a substantial number of black teachers may in some cases be evidence of nondiscriminatory hiring; in others, it is the legacy of an explicitly dual system of hiring and assigning teachers on a racial basis, as in Dayton.

** Also wrong is the idea that HEW's intervention in 1969 was "edg[ing] the legal limit." *Id.* *See* note 30, p. 41a, *infra*. As former Superintendent Carle pointed out, HEW actually acquiesced in the Board's desire to delay by allowing the Board a two-year period within which to achieve compliance. A.1010-11.

*** For example, in 1962 when the Board converted the old Dunbar into McFarlane elementary and opened the new Dunbar High School, virtually all-black faculties and virtually all-black student bodies were *simultaneously* assigned to these schools. *See* pp. 31a-32a, *infra*. Faculty- and student-assignment practices operate hand-in-glove, a point so obvious it is difficult to understand how the district court missed it.

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2. *Optional Zones and Attendance Boundaries*

We have already shown how the Dayton Board utilized optional zones and attendance boundary manipulation as segregative devices in connection with the 1952 West-Side reorganization (*see* note 11, p. 12a, *supra*). There are additional examples of both practices which stand on their own as segregation techniques.

Optional zones are dual or overlapping zones which allow a child, in theory, a choice of attendance between

two or more schools. A.562. Yet, the criteria stated by the Board for the creation of both attendance boundaries and optional zones are precisely the same: they constitute merely a type of boundary decision and serve no other educational or administrative purpose. A.544, 683-84. Optional zones have existed throughout the Dayton school district and apparently have been created whenever the Board is under community pressure which favors attendance at a particular school or disfavors attendance at a particular school. A.600, 844-45. Other than for such purely "political" reasons, there is no rationale which supports the establishment of an optional zone rather than the creation of an attendance boundary, which is a more predictable pupil-assignment device (A.685); and optional zones are at odds with the so-called "neighborhood school concept." A.7.

In many instances in Dayton optional zones were created for clear racial reasons, as, for example, in the West-Side reorganization, while in other instances the record reveals no known reason for their existence. But even in these latter instances some optional zones have had clear segregative effects. From 1950 to the time of trial, optional zones existed, at one time or another, between pairs of schools of substantially disproportionate racial compositions in some fifteen instances directly effecting segregation at some 21 schools.[19] In addition, at

[19] The West-Side reorganization in 1952-53 (*see* note 11, p. 12a, *supra*) involved six optional areas with racial implications: Willard-Irving, Jackson-Westwood, Willard-Whittier, Miami Chapel-Whittier, Wogaman-Highview, and Edison-Jefferson. A.589-91, 609-24. Other optional zones with demonstrable racial significance at some time during their existence include the following: Three optional zones between Roosevelt and the combination Fairview-White; two optional zones between Residence Park and Adams; and optional zones between Westwood and Gardendale, Colonel White and Kiser, Fairview and Roth, Irving and Emerson, Jefferson and Brown, and Jefferson and Cornell Heights. A.591-601, 604-05, 691-709; PX 47-51.

the high school level, Dunbar remained in effect a city-wide optional zone for blacks only through 1962 when it was converted into an all-black elementary school (A.574-75, 632-34) (*see* p. 31a, *infra*); and Patterson Co-op remained a city-wide and, through the 1967 school year, virtually all-white optional attendance zone.[20] In conjunction with the attendance-area high schools, these two special high schools operated as city-wide dual overlapping zones contributing to the pattern of racially dual schools at the high school level throughout the district. *See* A.632-34, 636-38; R.I. 1056-57.

Actual statistics on the choices made by parents and children in four optional areas are available. In each instance the option operated in the past, and in three instances at the time of trial, to allow whites to transfer to a "whiter" school. For example, in the Roosevelt-Colonel White optional area (which was carved out of Roosevelt originally about 1951-52 when the Board was creating optional areas between various West-Side elementary schools (*see* note 11, p. 12a, *supra*), from the 1959-60 school year through the 1963-64 school year a cumulative total of 1,134 white but only 21 black students attended Colonel White. S.Ct.A.464 (PX 15A1).[21] Testi-

[20] The city-wide Patterson Co-op operated in a more subtle segregative fashion than did Dunbar. In 1951-52, Patterson had no black students and no black teachers (S.Ct.A.507 (PX 130B)); by 1963 its student body and faculty were only 2% black (S.Ct.A.508 (PX 130C)); and by 1968 the pupil population rose to 18.3% black and the faculty to 3.5% black. S.Ct.A.509 (PX 130D). Students were admitted to Patterson through a special process involving coordinators and counselors, none of whom were black prior to 1968. A.755-58. Patterson has over the years served as an escape school for white students residing in black or "changing" attendance zones, particularly Roth and Roosevelt. R.I. 1056-57.

[21] At the November, 1977 hearing the Board presented a witness who had conducted a statistical analysis of this optional area and argued that it was having an integrative effect by 1970 because blacks in the zone were attending Colonel White. A.975-80. This witness conceded, however, that he was only looking at the effect on

mony from a Dayton school administrator indicates that from 1957 through 1961, although this optional area was predominantly white, black students who lived in the area attended Roosevelt which had become virtually all-black (Colonel White was 1% black). A.388-89. The Roosevelt yearbook for 1962 shows that only three white seniors from the optional area attended the black high school. S.Ct.A.462 (PX 15A). As Mrs. Greer testified, this optional area did "an excellent job of siphoning off white students that were at Roosevelt." A.269.[22]

Although many of these still-existing optional zones had already fulfilled their segregative purpose by the time

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the "white" school (Colonel White) and not the "black" school (Roosevelt); the true picture, therefore, was that in 1970 317 white students used the optional zone to avoid attending Roosevelt, which was thereby made 100% black rather than the 87% black it would have been without the racial option. A.991-95. This impact, of course, was in accord with the historic purpose and function of optional zones in Dayton. *See* note 11, p. 12a, *supra*.

[22] As another example, the Colonel White-Kiser option acquired its racial implications after its creation in 1962 with the racial transition of the Colonel White school, to which the Colonel White-Roosevelt option contributed in no small measure. At its inception and for several years thereafter, when both schools were virtually all-white, most children in the White-Kiser option area chose White. As Colonel White began to acquire more black students, whites chose Kiser more often until in the 1971-72 school year, no white children chose the 46% black Colonel White school, while 20 chose the 6% black Kiser school. S.Ct.A.465 (PX 15B1), 554 (DX AI(b)).

The rebuttal figures provided by the defendants on the Residence Park-Jackson optional area (see note 11, p. 12a, *supra*) are equally instructive, because the figures relate to a time when the optional area did not even exist by reason of the construction of the virtually all-black Carlson school and its assumption of the old Veterans Administration optional area as its regular attendance zone. S.Ct. A.586 (DX CO), 587 (DX CP). In any event, defendants' exhibit shows that from 1957 through 1963 no children from the former V.A. optional area attended Jackson, while 32 whites (and 8 blacks) attended Residence Park. In the 1957-58 school year, Residence Park was basically white and Jackson was black. A.220, 585-87. (By 1963, however, Residence Park had become 80% black. S.Ct.A.508 (PX 130C).)

of trial, over time they clearly contributed substantially to and facilitated school segregation. Moreover, even by the time of trial several of these optional areas continued to permit whites to escape to "whiter" schools, thereby further impacting the black schools and precipitating additional instability and transition in residential areas.[23]

Formal attendance boundaries, in conjunction with optional zones, have also operated in a segregative fashion; and in some instances firm boundaries were also drawn along racial lines.[24] An example is the boundary separating Roth and Roosevelt which was drawn in 1959. Roth took almost all the white residental areas on the far west side of Dayton from Roosevelt. At its opening, Roth

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[23] From 1968 through 1971, when Roosevelt was a 100% black school, for example, 375 white children from Roosevelt-Colonel White optional area attended Colonel White. S.Ct.A.464 (PX 15A1). Throughout its life, then, this option has allowed very substantial numbers of white children to avoid attending Roosevelt. By 1968, however, and not atypically, the optional area had undergone significant racial change and substantial numbers of black children were also attending Colonel White. S.Ct.A.462-63 (PX 15A), 464 (PX 15A1). Plaintiffs' expert, Dr. Foster, explained how optional attendance areas facilitate both educational and racial segregation:

> [T]he short term effect . . . is to allow whites to move out of a school assignment that is becoming black . . . [A.604].
>
> [G]enerally where you have an optional zone which has racial implications, you have an unstable situation that everyone realizes is in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation . . . [T]hese [optional areas in Dayton] accelerated and precipitated further segregation . . . [A. 601].

[24] In some instances, and in addition to the official optional zones, attendance boundaries have not been enforced for white children when assigned to black schools. For example, a pupil locator map made to assist in developing a middle school plan in the 1970-71 school year showed that many white children assigned by their attendance zone to the predominantly black Greene school were actually attending predominantly white schools located on the other side of Wolf Creek. A.469-70. A similar situation existed in the Carlson area. *See* note 22, p. 26a, *supra*.

had only 662 pupils, while Roosevelt's enrollment dropped by 602. Coupled with the exodus of whites out of Roosevelt through the Colonel White-Roosevelt optional areas, almost all whites were thereby transferred out of Roosevelt by Board action, in short order converting Roosevelt into a virtually all-black school. A.630-31; PX 48 & 46. (And, of course, the designation of Roosevelt as a black school was evidenced, in the traditional way, by assigning ever-increasing numbers of black teachers to the school. A.139-42 (PX 3).)

At about this same time, Meadowdale high school also opened, but as a virtually all-white school. S.Ct.A.317 (PX 4). Opportunities were available for the placement of such high schools and use of the excess capacity or the redrawing of the boundaries of Roth, Roosevelt, Stivers, Fairview and Meadowdale in order to accomplish desegregation. But school authorities selected the alternatives that continued rather than alleviated the extreme racial segregation at the high school level. A.737-41, 581-82, 630-31; PX 6. This pattern was capped in 1962 when a new Dunbar high school opened with a virtually all-black faculty and a defined attendance zone that produced a virtually all-black student body. At the same time the Board converted the old Dunbar high school building into an elementary school (renamed McFarlane), whose newly-created attendance zone took in most of the students in the zones for the all-black Willard and Garfield schools, which were closed. *See* note 9, p. 7a, *supra*, and pp. 31a-32a, *infra*.

Finally, the Board also persistently refused to redraw boundaries between, or pair, contiguous sets of schools which had been, and were at the time of trial, substantially disproportionate in their racial compositions. Examples of such contiguous pairs include Drexel (8% black) and Jane Adams (79% black); McGuffey (42% black) and Webster (1% black) or Allen (1% black);

Irving (99% black) and Emerson (9% black); Whittier (99% black) and Patterson (0% black). PX 68, 62. Such alternatives to segregation—many of which were recommended by subordinate school administrators and even the Ohio State Department of Education (A.309-12; S.Ct.A.419-55 (PX 12))—were rejected by the Board.

[*DISTRICT COURT'S OPINION*

(Pet.App. 155a, 159a, 162a-69a, 170a, 174a)

The court's unsupported summary conclusion that "[n]o evidence has been presented suggesting that attendance zones were redrawn to promote segregation" (Pet.App. 155a), is clearly erroneous, as the evidence set forth above demonstrates. Examples of similar errors include the conclusion that no segregation intent was involved in the redrawing of Dunbar's high school zone in 1962, as well as the boundary changes attendant upon conversion of the old Dunbar into McFarlane elementary. Pet.App. 159a. Viewed in their historical context (which of course the district court does not do) there is no alternative but to conclude that these changes were carried out with plain old-fashioned segregative intent. Similar clear error occurred with respect to the court's evaluation of the Roosevelt boundary change which accompanied the 1959 opening of Roth High School (Pet.App. 174a) as demonstrated by the factual discussion at pp. 27a-28a, *supra*.

The court's conclusions that optional zones, including the city-wide high school options, had neither segregative intent nor effect (Pet.App. 162a-69a), also are clearly erroneous. Here as elsewhere the court commits threshold error in not analyzing the optional zones in light of their genesis in the early 1950's when they were deliberately

initiated for demonstrably segregative ends. *See* pp. 11a-12a, *supra*.* In proper context, therefore, many optional zones in the Dayton district were instituted for racial reasons, and over time they had a significant racial impact which preserved, perpetuated and exacerbated intentionally-imposed systemwide segregation. The court's contrary conclusions are manifestly erroneous. The facts and their true meaning are as we have set them out above.]

* Optional or dual overlapping zones were the mainstay of the "southern" style of dualism. *See Green*, 391 U.S. at 432.

Such options are a classical segregation device which the courts have found prevalent in the "northern" cases as well. *See, e.g., United States* v. *School District of Omaha*, 521 F.2d 530, 540-43 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975), and cases cited; *Bradley* v. *Milliken*, *supra*, 484 F.2d at 232-35, and cases cited. Judge Wisdom has correctly described this device as "unadulterated segregation." *United States* v. *Texas Educ. Agency*, 457 F.2d 848, 867 (5th Cir. 1972).

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3. *School Construction, Closing and Site Selection*

The Board's school-construction, school-closing and site-selection policies and practices over the past two decades failed to alleviate the condition of state-imposed segregation extant at the time of *Brown*. To the contrary, the Board's policies and practices in these areas impacted the dual system and literally sealed it in. In the period of expansion of the school system from the late 1940's to the mid-1960's, the overwhelming majority of new schools and additions to schools were located by the Board in either virtually all-black or virtually all-white areas, and attendance boundaries were drawn or maintained so that new schools and expansions of existing facilities opened as virtually one-race schools. A.562-71, 649-50; R.IV. 512-14. Of 24 new schools constructed between 1950 and the present, 22 opened 90% or more black or 90% or more white. A.562-63; S.Ct.A.316-17 (PX 4). During

the same expansion period, additions to existing facilities followed the same pattern. Seventy-eight of some 86 additions of regular classroom space, for which racial compositions are known, were made to schools 90% or more one race at the time of the expansion; only nine additions were made to schools less than 90% black or white. A.649-50. The race-based nature of these practices is made crystal clear by the coordinate assignment of professional staffs to these schools and additions tailored to the racial composition of the pupils. S.Ct.A.316-17 (PX 4); A.644, 794-96, 800, 924-25, 926-28, 1018-19.[25]

A few examples will suffice to illustrate the racial underpinnings of this complex process. For example, in 1962 the Willard and Garfield schools, previously designated for blacks only, were closed and the old blacks-only Dunbar high school building was converted into McFarlane elementary. Most of the children from the Willard and Garfield attendance areas were simply assigned to the McFarlane school which opened, certainly to no one's surprise, with an all-black pupil population and an all-black faculty. Some children from the Willard and Garfield areas were also assigned to the all-black Irving and Miami Chapel elementary schools. At the same time, a newly

[25] Plaintiffs' expert, Dr. Gordon Foster, testified that such school construction patterns "by and large . . . took the place of changing zone lines in terms of maintaining existing racial patterns and compacting them." A.734. Mr. Bagwell, the Dayton Board's chief rebuttal witness with respect to school construction, admitted that "in effect then, when you . . . put an addition to a school, that as far as that space is concerned, you determine the boundaries and they are coextensive with the original boundaries of the school. . . . So that if a school is already 100 percent black and you are making an addition to that school, you in effect have determined the boundaries to be . . . creating a hundred percent black school unit." A.799. The same is true with respect to the virtually all-white or all-black primary units, as well as one-race additions. A.582, 951-53, 1087-93. And the placement of portable classrooms also operated to seal in the racial patterns. A.575-80.

constructed Dunbar high school, located in a black neighborhood at the farthest corner of the school district away from substantial white residential areas, opened with a virtually all-black student body and faculty. *See* note 9, p. 7a, *supra;* A.574-75, 632-34, 1034-35, 1038-39, 1041-42, 1051-57, 1093-98. Thus, a major new element was added to the dual system and, although there was some juggling within, the color line was expanded and reinforced.

A final example, presenting the converse of the above examples, relates to the Board's failure to utilize excess capacity to the maximum efficiency as pupil populations declined by over 10,000 following their peak year in the mid-1960's. Even conservative estimates at the time of trial indicated that the Board could have closed down 9 or 10 average-size elementary schools. A.571-75; S.Ct.A.489-98 (PX 56). Such closings would have presented the Board with substantial opportunities to accomplish significant savings in costs, and at the same time accomplish substantial desegregation.[26] But rather than closing selected black and white schools and reassigning pupils to accomplish actual desegregation, the Board elected the more costly segregative option of keeping these under-utilized schools open and maintaning their racial identity.

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[26] There would be substantial cost savings with respect to such closings, even if substantial pupil transportation were required to accomplish school desegregation conveniently and safely for the children. According to the Board, the average yearly per pupil transportation cost on Board-owned buses is $50.00, while the average yearly per pupil cost for simply maintaining a pupil space in a school is $140.00. (Nos. 33 & 33A of plaintiffs' Requests for Admissions (served October 13, 1972), admitted by both the Board and the Superintendent and Board minority. A.119, 132, 136.)

[*DISTRICT COURT'S OPINION*

(A.87-89, 90-97)

The district court acknowledged the segregative pattern of the Board's school construction/site selection practices (A.90), which from an administrative perspective "approached the level of haphazard in some instances." *Id.* at 91. The court concluded, however, that plaintiffs had not shown that the Board's practices of "site selection, construction of additions, use of portables, or school utilization had a segregative purpose or that such policy had an incremental segreative effect upon minority pupils, teachers, or staff." A.97. With respect to the question of segregative intent, the court's conclusion is unsupportable. The court is able to arrive at this conclusion with a straight face only by treating these practices in a context completely removed from the Board's systematic pre-*Brown* practices of building and converting schools for black students and black teachers only, by not recognizing how much the post-*Brown* patterns of faculty assignments to new schools bespoke unmitigated segregative intent, and further by avoiding the obvious facts, such as the construction of the new Dunbar (and the interrelated closing of Willard and Garfield, and the conversion of the old Dunbar into McFarlane), which are inexplicable except in terms of race. In this more complete context (a context which the court studiously refused to deal with*), the finding of no segregative intent is clearly erroneous. Even more astounding is the court's conclusion that none of these practices had segregative effect! This conclusion is contrary to the court's own subsidiary findings (*e.g.*, A.90), and contrary to sound reason. Given the opinion's repeated conclusions that nothing the Board did had a segregative effect, a stranger to the district court's conduct in this case would no doubt be puzzled, if not flabbergasted, as to why the Dayton schools were almost totally

segregated at the time of trial. These "findings" also are wholly in error.]

* The court insisted on wearing blinders to the extent of refusing to allow a plaintiffs' witness to testify about matters occurring prior to 1954. A.1026. Having thus frustrated and limited the witness, the court then proceeded, in unsportsmanlike fashion, to rely upon him for a finding adverse to plaintiffs (A.88), as well as to the record as a whole.

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4. *Grade Structure and Reorganization*

As previously noted, the Board persistently refused to alter grade structures by pairing schools to accomplish pupil desegregation. *See* p. 32a, *supra*. Likewise, the differential grade structure involved in the construction of primary units, and the grade organizations of the Dunbar high school (prior to 1962) and the Patterson high school (prior to 1968-69 school year) have perpetuated and compounded school segregation. *See* notes 8, 9 & 20, pp. 6a-7a & 25a, *supra*.

The Board acted in similar fashion in the 1971-72 school year when it reorganized the grade structures of some 20 elementary schools from K-8 to K-5, 6-8. This grade reorganization program presented an important opportunity for the Board to accomplish substantial desegregation by judicious selection of sites, alterations of feeder patterns, and the establishment of the new attendance zones for both the middle (6-8) and elementary schools (K-5) affected. S.Ct.A.376-87 (PX 10). Yet, in the face of recommendations from the State Department of Education of alternatives for accomplishing substantial desegregation, and the development of a pupil locator map so that there could be no doubt about the racial impact of its actions, the Board implemented a plan which reimposed segregation at three middle schools and their feeder elementaries, increased racial segregation at another middle school, and accomplished some desegregation at the

fifth middle school. S.Ct.A.453-54 (PX 12). The Board's actions thus resulted in "increasing or maintaining segregation as opposed to availing the opportunity of decreasing it." A.646. The Ohio State Department of Education was of a similar view; it notified Dayton school authorities that the middleschool reorganization program "has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren." S.Ct.A.454 (PX 12).

[*DISTRICT COURT'S OPINION*

(Pet. App. 157a-58a)

The district court concluded that the grade-structure reorganization accompanying the creation in 1971 of five middle schools was not a result of segregative intent. This conclusion might not be clearly erroneous if the facts had arisen in a school system with no history of intentional segregation. But these events occurred in Dayton, and even the Ohio State Department of Education could not avoid the conclusion that the Board was up to its same old segregative tricks. The district court's contrary finding is clearly erroneous.]

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5. *Pupil Transfers and Transportation*

Prior to the West-Side reorganization in 1952 (*see* pp. 11a-12a, *supra*), the Dayton Board regularly transferred (and provided transportation where necessary to) white children from the attendance areas of black schools, past or away from other all-black schools to "whiter" schools. A.861-63. Thereafter, the Board utilized optional zones to provide white children with an equally effective means of

transferring out of the core black schools to "whiter" schools. *See* note 11, p. 12, *supra.* And the city-wide Dunbar and Patterson high schools operated in similar fashion. *See* notes 9 & 20, pp. 7a & 25a, *supra.*

In addition, curriculum, hardship and disciplinary transfers have functioned in many instances to assign white children from black schools to "whiter" schools. A.390-93, 355, 356-57. Two prime examples are the use of curriculum transfers by white students under the Freedom of Enrollment plan (A.356-57), and the emergency transfers of students in 1969 involving the Roth and Stivers high schools. A.638-40; S.Ct.A.469-70, 474 (unmarked exhibits). This latter incident takes on additional significance because it occurred in connection with the only time prior to trial that the Board redrew an attendance boundary to accomplish desegregation. This was accomplished by adding some of the all-black Roosevelt and Dunbar attendance areas to the predominantly white Stivers high school. A.486-89. In the very first year following this realignment, racial problems at Stivers, as well as at the predominantly black Roth, led to the transfer of 34 black students out of Stivers to the all-black Dunbar or Roosevelt schools, and 36 white students out of Roth to the virtually all-white Meadowdale, Stivers, Kiser and Fairview high schools. None of the white children transferred were assigned to black schools; and none of the black children transferred were assigned to white schools. A.491-98.

Overall, hardship, emergency and special education transfers were also carried out in such a way as to reflect and reinforce the underlying racial duality in pupil assignments. A.639. During the 1972-73 school year, for example, 266 (or 70%) of the 377 black children transferred were assigned to black schools, and 155 (or 91%) of the 171 white children transferred were assigned to white schools. S.Ct.A.379-80 (PX 16F).

Throughout the post-*Brown* period, non-resident pupils attending the Dayton system on a tuition basis were assigned in a similar racially dual fashion: white pupils were assigned to white schools (A.473-74), and black pupils were assigned to black schools. R.I. 579-80. The assignment practices relating to several hundred white high school pupils from Mad River Township, who attended the Dayton system on a tuition basis throughout the 1950's, is illustrative. These students were assigned to the virtually all-white Stivers, Kiser, Wilbur Wright, and Belmont high schools. When the Board felt there might be capacity problems at the schools, the Board did not consider assigning these non-resident pupils to the black Dunbar, Roosevelt or Roth high schools, which had ample space. Instead, the Board notified the Mad River Township school district that space would be unavailable for these tuition pupils in the 1960s. A.473-77, 857-60; S.Ct.A.475 (unmarked exhibit). In all of the various forms of pupil reassignment, it was the unbroken practice of the Board *never* to reassign white pupils to identifiably black schools. A.474.

An additional, classical segregation technique utilized by the Dayton Board was "intact" busing. There are two examples. First, in 1963 white children from the Ruskin school were transported intact (*i.e.*, teacher and class as a unit) into separate one-race classes at the racially mixed Central school. A.304-05. The second instance occurred in 1968 when the black Edison School was partially destroyed by fire. These black children were transported to a number of white schools throughout the city. But they remained as segregated as if they had been transferred to all-black schools, because they were accommodated in the white transferee schools in separate intact classes. A.301-03, 421-23.[27]

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[27] Significantly, intact busing was not the Board's first alternative with respect to reassigning the Edison children. As Assistant Super-

Thus, for several decades Dayton school authorities have transported children for a variety of reasons. But, with only a few hard-fought exceptions, children have never been transported in such a fashion as to accomplish desegregation; with singular consistency, the Dayton

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intendent Harewood, the first black in the Board's central administration, recounted the incident, the first proposal under consideration was to house these black children in neighborhood churches. This proposal was abandoned only under pressure from Mr. Harewood, who pointed out that there were vacant classrooms in other schools in the city. Then, without further consultation with Mr. Harewood, the decision was made to transport self-contained black units into the white schools. A.301-03. The next fall, the new Superintendent of Schools ordered that the "intact" aspect of these reassignments be terminated. Upon later examination, however, he found that the black children were still being segregated within the white schools under somewhat more subtle "tracking" procedures, and he again ordered that the children be fully integrated. A.423-24. Thus, only through pressure from a new Superintendent and from Mr. Harewood was the "intact" brand of racial discrimination terminated, and the Edison children integrated into the white schools to which they had been reassigned.

Also at this time, predominantly black groups of children from the over-crowded Jefferson school were assigned by non-contiguous zoning to a number of white schools. A.397, 399; PX 122. These small amounts of actual, although only one-way, desegregation were short-lived, however. Instead of expanding the use of these desegregative alternatives, the Edison and Jefferson reassignments were terminated for the 1971-72 school year and the black children were resegregated into the rebuilt black Edison school (and by then, the black McFarlane middle school), and the black Jefferson school. A.465. The segregative effect of these reassignments is shown by the following chart comparing the percentage of blacks in the receiving white schools (*see* PX 122) in the 1970-71 school year to that existing in the 1971-72 school year:

School	% Black 1970-71	% Black 1971-72
Ft. McKinley	9.6	1.6
Loos	9.5	6.0
Horace Mann	11.1	0.7
Shiloh	7.4	0.9
Shoup Mill	13.9	1.4
Velerie	20.0	13.5

Board's transportation practices have maintained, reinforced and/or exacerbated racial segregation.[28]

Finally, the Board's Freedom of Enrollment policy, as it existed at the time of trial, was, at best, a washout as a desegregative technique. Under this policy, students residing in an attendance area were given first priority to attend that school; second priority was given to students requesting transfer to a school for a specially available course; and the third priority was given to children requesting transfers and whose enrollment would improve the racial balance in the receiving school. S.Ct.A.466-67 (PX 16B). The first priority merely froze in the pattern of segregation which began two-thirds of a century ago. The second priority actually contributed to school segregation because it was used by whites to transfer from black schools to white schools. A.356.[29] Under the third priority, 459 black children transferred in the 1972-73 school year to white schools, thereby accomplishing some actual desegregation; but only one white child, formerly in a parochial school matriculating into a 54.3% black high school, made a racial balance transfer. S.Ct.A.478 (PX 16D); A.639. Hence, transfers under the Freedom of Enrollment policy were exclusively one-way—i.e., some

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[28] Although transportation has been used only twice (*see* note 27, *supra*) for desegregation purposes, pupil transportation has not been an uncommon event in Dayton. For many years white children in the far northwest, northeast and southeast areas of the system were transported to white schools in those areas (A.440), and, of course, black orphan children were transported all the way across town to the all-black Garfield school (*see* note 6, p. 5a, *supra*).

Ohio law requires that local school authorities make transportation available, and the Dayton Board so acts, for students who are assigned to schools beyond a prescribed distance from home. A.432, 440, 866-67.

[29] In the 1972-73 school year, for example, 22 of 23 white students transferring under the Freedom of Enrollment policy were transferred to white schools. S.Ct.A.478 (PX 16D).

blacks and some whites transferring to white schools—and had a negligible if not retrogressive impact on the racially dual pattern of pupil attendance.

[*DISTRICT COURT'S OPINION*

(Pet.App. 160a-62a)

Even if the approach of the district court is followed and the above facts are assessed in total ignorance of the remainder of this massive record, the conclusion would seem inescapable that many of these instances reflect subjective racial malevolence on the part of the school authorities. The district court not only ignores the whole record, however, it also ignores many of these facts; as to others, the court summarily concludes that the evidence reflects nothing more than strict racial neutrality. By themselves and in the context of the other widespread discrimination of record, the facts described above are further evidence of the intentional discrimination which infected the Dayton school system at the time of trial. The court's refusal to so conclude is clearly erroneous.]

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6. *The Board's Recission of Its Affirmative Duty*

As reflected in the foregoing pages, black citizens of Dayton have been thwarted in their attempts to end state-imposed racial segregation in their public schools. Even aggressive action, such as that taken by Robert Reese's father when he went to court in 1926 to challenge intentional efforts to segregate his children, was effectively blunted by Dayton school authorities committed to separation of the races. *See* pp. 3a-5a, *supra*. During another period of active unrest, 1951-52, the Board imposed the

West-Side reorganization and a new racially discriminatory faculty-assignment policy. *See* pp. 11a-12a, 15a-17a, *supra*. The black community's repeated protests following *Brown* to the continued segregation also were turned aside. *See* S.Ct.A.358-59, 456-57, 459-61. By the late 1960's, however, those who objected to state-imposed school segregation began to gain allies, both in the white community in Dayton and among state and federal agencies. As previously noted (*see* page 20a, *supra*), HEW conducted a Title VI compliance review in 1968 and forced the Board in 1969 to agree to end its racially dual faculty-assignment practices. HEW had also noted the "substantial duality in terms of race or color with respect to distribution of pupils in the various schools . . ." (S.Ct.A. 415), but the agency did not pursue this concern with similarly aggressive action.[30]

Also during these years, the Dayton Board, in the 1971 words of the State Department of Education, "passed various and sundry resolutions . . . designed to equalize and to extend educational opportunities, to reduce racial isolation, and to establish quality integrated education in the schools." S.Ct.A.423. But these were just words and informal ones at that. As the State Assistant Superintendent for Urban Education noted at the same time, there was a definite need for action and not just words. S.Ct.A.422.

On April 29, 1971, the Board requested assistance from the State Department of Education's Office of Equal Educational Opportunities to provide technical assistance

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[30] As is commonly known, from the frequent judicial declarations on the subject, HEW has generally failed to fulfill its Title VI obligations with respect to pupil desegregation in both the North and the South. *See, e.g., Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*); *Brown* v. *Weinberger*, 417 F.Supp. 1215 (D.D.C. 1976). And it has not been notably aggressive even with respect to faculty segregation. *See Kelsey* v. *Weinberger*, 498 F.2d 701 (D.C. Cir. 1974).

in the development of alternative desegregation plans. The Board also authorized its President to appoint a committee of community representatives to assist and advise the Board in connection with such proposed plans. S.Ct.A.354-55.

The State Department of Education responded by assembling a team of consultants and specialists to evaluate data and make recommendations. Their recommendations were submitted to the Dayton Superintendent on June 7, 1971. S.Ct.A.419-55. The State Department advised the Dayton Board of its constitutional and other legal obligations (S.Ct.A.435) (emphasis in original):

> Since the Board, *as an agency of state government*, has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative duty to comply with the Constitution; that is, as the Supreme Court has stated, "to eliminate from the public schools all vestiges of state-imposed segregation."

The State Department then turned its attention to a list of alternatives, and urged the Dayton Board to shoulder its constitutional obligations *now* (S.Ct.A.441) (emphasis in original):

> *Delaying tactics could be continued.* The Board, in spite of resolutions and overt commitment, could choose to make only the slightest mandated changes, and to utilize the best legal talent available to resist compliance with constitutional requirements. Other school districts have chosen this alternative, even as Dayton has used similar methods in the past. However, the highest court in the land has stated the constitutional offensiveness of state-imposed segregation of school-children, and persisting delay clearly violates the oath of office of members of the Board of Education in the state of Ohio.

The State Department concluded by recommending "a comprehensive plan" that would be a "constitutionally valid and inoffensive, educationally sound, and morally proper" approach for "the Dayton Board of Education, acting as an agency of Ohio State Government. . ." to take. S.Ct.A.444.[31]

The Board-appointed advisory committee of community representatives became known as the "Committee of 75." In his charge to the Committtee, the Dayton Board President stated: "We have admitted that the district is guilty of procedures which have led to the racial isolation of school children." S.Ct.A.356. The Committee issued its report in the fall of 1971. The Report of the Committee of 75 (S.Ct.A.345-69) also urged the Board to adopt a comprehensive plan and joined the State Department in emphasizing "that time for a change in Dayton has run out! We must act now." S.Ct.A.369.

On December 8, 1971 the Dayton Board of Education, for the first time ever, responded with meaningful action. It first "recognize[d] and admit[ted] that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor Boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs. . . ." S.Ct.A.321. The Board then adopted a program of actual systemwide desegregation and directed the Superintendent to implement such a new pupil-assignment policy for the 1972-73 school year. The new policy consisted of two principal

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[31] Under the terms of Opinion No. 6810, issued by the Ohio Attorney General on July 9, 1956, the State Department of Education has the primary affirmative duty to see that local school districts comply with their Fourteenth Amendment obligations with respect to public schooling. S.Ct.A.597-606.

parts: first, the existing attendance zones and the Freedom of Enrollment policy [32] were abrogated effective September 1, 1972; second, in their stead, a new pupil-assignment policy was adopted, the goal of which was that no school would have a racial composition "substantially disproportionate to the district as a whole." S.Ct.A.329. Pursuant to the Board's directions, the Superintendent of Schools adopted a plan for Fall 1972 prepared by Dr. Gordon Foster and others of the Title IV Florida School Desegregation Consulting Center of the University of Miami. S.Ct.A.370-414.

On January 3, 1972, however, a newly-constituted Dayton Board [33] rescinded the prior Board's action of December 8, 1971, refused to consider the plan adopted by the Superintendent, reinstated the Freedom of Enrollment policy and reimposed the segregated attendance zones. S.Ct.A.331-53.[34] The Board thus intentionally reinstated systemwide segregation of the public schools.

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[32] The Board's Freedom of Enrollment policy was adopted in 1969. S.Ct.A.466-67. It had a very negligible, one-way desegregative effect (*i.e.*, a few black students transferring to white schools), but white students did not transfer to black schools. S.Ct.A.478 (PX 16D). As the Superintendent testified, "the pattern. . . . has been pervasive down through the years, that no white students, regardless of from where they came, or the purpose, were assigned to black schools." A.474. *See also*, pp. 39a-40a, *supra*.

[33] Three new members of the seven-member Board had been elected the previous November to take office in January.

[34] By its actions, the new Board made it clear to the Superintendent that he would not be permitted to exercise his independent authority over the assignment of pupils (*see* Ohio Rev. Code § 3319.01) to implement the desegregation plan. A.425, 929-30. The statute just cited vests the local Superintendent of Schools with the responsibility to "assign the pupils of the schools under his supervision to the proper schools and grades," except with respect to the assignment of pupils to schools outside their school districts of residence, where board approval is necessary.

[*DISTRICT COURT'S OPINION*

(Pet.App. 180a-85a)

The court ignored altogether the findings of the Committee of 75, the State Department of Education, and HEW, as well as the admissions of the Board itself, that the Board was responsible—*i.e.*, had caused—the serious racial segregation of the schools then extant. These findings and admissions of public agencies and their appointed representatives are highly probative; indeed, in the context of this record they are eminently correct. The district court clearly erred in not assigning weight to, and in refusing to adopt, these findings and conclusions. As a consequence, or perhaps independently, the court also erred in failing to conclude that the rescission was itself an act of intentional systemwide segregation. The court is clearly mistaken in its apparent conclusion that the Board's December 8, 1971 decisions aimed at curing admitted acts of segregation constituted an effort to "manufacture" a constitutional violation "by political or legal maneuvering." Pet.App. 184a.* The Board's December 8, 1971 decision to desegregate the system was the considered product of determinations that affirmative remedial action was required to comply with the Board's constitutional obligations. When the new Board voted on January 3, 1972, to rescind this desegregation program and reinstate segregation across the board, it did more than simply make a different judgment about appropriate educational policy. It deliberately turned back the clock in a demonstrably segregative fashion. And it did so without offering any evidence to show that the uniform conclusions of HEW, the Ohio State Department of Education, the Committee of 75, and the 1971 Board and Superintendent of Schools, were either precipitous or incorrect. The rescission thus intentionally reimposed segregation on a system-wide basis. It was a purposeful act of racial discrimination infecting the entire system

and again communicating a policy of segregation to all of Dayton's citizens. The district court thus came somewhat closer to the correct analysis in its 1973 opinion (A.6). The court's present failure to adopt the factual analysis set forth above is clearly erroneous.]

* Here the district judge appears to be relying upon his personal "views as to the obligations and the legal representation of public bodies, and it does not include in my opinion the discussion with non-representing attorneys . . ." R.IV. 250 (statement of the court); *see also id.* at 248-50. These views (contrary to those held by the judge in 1972, when he considered these matters irrelevant, *see id.* at 250; A.451-53) have to do with the fact that prior to the December 8, 1971, resolutions, Superintendent Carle and some of the Board members met with several persons on different occasions who were knowledgeable about school desegregation in the United States. The judge seemed particularly upset that one of these persons was an attorney, Louis R. Lucas, who subsequently represented (and still does) the plaintiffs in this litigation. Regardless of Judge Rubin's personal views, Dr. Carle was clearly correct in claiming the right to do as he and the Board members did: "We had virtually every month or so been consulting with people who were involved with desegregation and/or legal aspects of desegregation around the country, and this was just one more opportunity to expose myself to a person who had good deal of experience in the field." R.IV. 249. There is no rule in Ohio or anywhere else prohibiting public officials from talking to knowledgeable lawyers, if they are able to find any.

At the time of trial, the Dayton school district was segregated by race, as it always had been. In the 1971-72 school year (when the complaint was filed), there were 69 schools in the Dayton district; 49 of them had student enrollments 90% or more one race (21 black, 28 white). Of the 54,000 pupils enrolled, 42.7% were black; 75.9% of all black students were assigned to the 21 black schools. S.Ct.A.314 (PX 2D).[35] Thus, although the system was

[35] In 1972-73 there were 68 schools, of which 47 were virtually one-race (22 black, 25 white). Fully 80% of all classrooms were virtually one-race. (Of the 50,000 pupils in the district that year, 44.6% were black). S.Ct.A.311 (PX 2A).

larger, it was basically the same dual system that existed at the time of *Brown* (*see* pp. 2a-18a, *supra*).[36]

Every school which was 90% or more black in 1951-52 *or* 1963-64 *or* 1971-72, and which was still in use at the time of trial (1972-73 school year) remained 90% or more black. Of the 25 white schools in 1972-73 (*see* note 35, *supra*), all opened 90% or more white and, if open, were 90% or more white in 1971-72, 1963-64, and 1951-52. S.Ct.A.315 (PX 2E). *See also Brinkman I*, 503 F.2d at 695.

[*DISTRICT COURT'S OPINION*

(Pet.App. 149a-50a)

These basic facts are not disputed—not even by the district court.]

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[36] It was also the same one that existed in the 1963-64 school year (the first year after *Brown* for which racial data is available). In that year there were 64 schools in the Dayton system, of which 57 had student enrollments 90% or more one race (13 black, 44 white). Of the 57,400 pupils in the district that year, 27.8% were black. Yet 79.2% of all the black pupils were enrolled in the 13 black schools; and 88.8% of all pupils were enrolled in such one-race schools. S.Ct.A.313 (PX 2C).

Supreme Court, U. S.
FILED
MAR 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend,
Donna Brinkman, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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Claudius R. Walker, Frsericca M. Walker and Bernice L. Walker, by their Father and Next Friend, C. R. Walker, Jr.;

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BRIEF OF PETITIONERS

I. OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, entered on July 27, 1978, is reported at 583 F.2d 243 (*Dayton IV*).

The other three opinions of the Sixth Circuit in *Brinkman* v. *Gilligan* are reported at 539 F.2d 1084 (1976) (*Dayton III*), *vacated and remanded sub nom., Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) (*Dayton*); 518 F.2d 853 (1975) (*Dayton II*), *cert. denied*, 423 U.S. 1000 (1975); and 503 F.2d 684 (1974) (*Dayton I*).

The decision of the Supreme Court in *Dayton*, the decisions of the Sixth Circuit in *Dayton I-IV* and the unreported opinions of the District Court are reproduced in the appendix to the petition for a writ of certiorari.[1]

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals in *Dayton IV* was entered of record on July 27, 1978. The Dayton Board's petition for a writ of certiorari was granted on January 8, 1979.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fourteenth Amendment To the United States Constitution, Section 1:

> ". . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the law."

[1] References to the appendix contained in the petition for a writ of certiorari are indicated by a capital "A" and the page number which is followed by a small letter "a". References to the exhibit appendix are indicated by a capital "A" and the page number which is followed by an "Ex". Any references in this brief to the record consisting of the twenty volumes transcribed during the violation hearing held in November and December of 1972 consist of the designation R.I., followed by the page and volume number; references to the record of the remedial hearings held in February of 1975 consist of the designation R. II.; references to the record of the remedial hearing held in December, 1975 and March, 1976 consist of the designation R. III.; and references to the record of the remand hearing held in November of 1977 consist of the designation R. IV.

B. United States Code, Title 20:

§ 1712. Formulating remedies; applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek to impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

§ 1751. Prohibition against assignment or transportation of students to overcome racial imbalance

No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

§ 1754. Provisions respecting transportation of pupils to achieve racial balance and judicial power to insure compliance with constitutional standards applicable to the entire United States

The proviso of section 2000c-6(a) of Title 42 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

C. United States Code, Title 28:

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

D. United States Code, Title 42:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

E. Ohio Revised Code, Chapter 33:

§ 3313.48. Free Education To Be Provided; Minimum School Year

The Board of Education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof.

IV. QUESTIONS PRESENTED

A. In A School Desegregation Case, Is A Finding Of A Systemwide Violation Justified By Postulating A 1954 Duty To Diffuse Black And White Students Throughout A School System And Creating Therefrom A Presumption Of Systemwide And Continuing Segregative Intent As The Cause Of Racially Imbalanced School Populations At The Time of Suit?

B. Is The Effect Of Board Actions, Viewed Under A Natural and Foreseeable Result Test, Sufficient To Establish Segregative Intent In A School Desegregation Case?

C. Once Constitutional Violations Have Been Established In A School Desegregation Case, Is The Imposition Of A Systemwide Racial Balance Plan Justified In The Absence Of Proof That Such A Plan Reasonably Approximates The Racial Distribution Of School Populations That Would Have Occurred In The Absence Of Such Violations?

D. Is The Imposition Of Any Remedy In A School Desegregation Case Justified In The Absence Of Proof That Any Of The Plaintiffs Bringing The Action Had Been Injured Or That The Action Is Maintainable As A Class Action?

V. STATEMENT OF THE CASE

The history of this litigation during the period from its inception on April 17, 1972, until the decision rendered by this Court on June 27, 1977, is set forth in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977) (*Dayton*).[2] On

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[2] "This action was filed on April 17, 1972, by parents of black children attending schools operated by the defendant Dayton Board of Education. After an expedited hearing between November 13 and December 1, 1972, the District Court for the Southern District of Ohio on February 1, 1973, rendered findings of fact and conclusions of law directing the formulation of a desegregation plan. (A. 1a). On July 13, 1973, that court approved, with certain modifications, a plan proposed by the School Board. On appeal to the Court of Appeals for the Sixth Circuit, that court affirmed the findings of fact but reversed and remanded as to the proposed remedial plan. *Brinkman* v. *Gilligan,* 503 F.2d 684 (CA6 1974).

"The District Court then ordered the submission of new plans by the Board and by any other interested parties. (A. 70a). On March 10, 1975, it rejected a plan proposed by the plaintiffs, and, with some modifications, approved the Board's plan as modified and expanded in an effort to comply with the Court of Appeals mandate. (A. 73a). On appeal, the Court of Appeals again reversed as to remedy and directed

remand, pursuant to this Court's directive, the District Court conducted evidentiary hearings which commenced on November 1, 1977. Considering all of the evidence presented at the various trials and hearings of this action in the light of the principles established by this Court, the District Court concluded that the plaintiffs had failed to establish a right to relief. On December 15, 1977, it accordingly entered an order dismissing the plaintiffs' complaint (A. 188a).

The District Court based its order on a detailed series of findings of fact and conclusions of law (A. 142-188a). In considering historical isolated incidents of constitutional violations, it found that there was no proof that such actions had any incremental segregative effect (A. 147-149a). Existing racial imbalance was found not to be a result of any intentional segregative act or acts on the part of the Dayton Board, but rather the simple reflection of residential living patterns in the geographic area served by the school system (A. 149-150a).

The one adverse finding made in the previous decision of the District Court – the maintenance of optional attendance zones between contiguous schools throughout the district – was re-examined in the light of additional evidence presented at the hearings following the remand. The evidence demonstrated neither segregative intent nor segregative effect in the establishment and maintenance of optional zones (A. 162-169a).

After the dismissal of their complaint, the plaintiffs filed a notice of appeal to the Sixth Circuit Court of Appeals. On January 16, 1978, the Sixth Circuit issued a stay order holding in effect, pending appeal, the systemwide racial balance plan

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that the District Court 'adopt a system-wide plan for the 1976-1977 school year.' . . . *Brinkman* v. *Gilligan,* 518 F.2d 853 (CA6 1975).

"Upon this second remand, the District Court, on December 29, 1975, ordered formulation of the plan whose terms are developed below. (A. 99a). On March 25, 1976, the details of the plan were approved by the District Court. (A. 110a). In the decision now under review, the Court of Appeals affirmed. *Brinkman* v. *Gilligan,* 539 F.2d 1084 (CA6 1976)." *Dayton Board of Education* v. *Brinkman, Ibid.*

which had been imposed prior to this Court's decision in *Dayton*. On June 27, 1978, the Sixth Circuit reversed the District Court's dismissal of the case and entered a final order reinstating the systemwide racial balance plan (A. 217a). Applications for a stay were denied by the Sixth Circuit and by this Court. Students in the Dayton system are still being transported to distant school buildings under a plan that cannot stand under the facts presented and the constitutional principles applicable to those facts.

VI. SUMMARY OF ARGUMENT

The lower courts were presented with two basic questions for determination:

(1) Did the Dayton School Board take actions with segregative intent?

(2) If so, what incremental segregative effect did those actions have on the racial distribution of the school population as presently constituted?

If the answers to these questions required remedial action, the lower courts were then required to construct a remedy that would serve to eliminate the incremental segregative effect of the Board's actions.

The Sixth Circuit misconstrued the nature of the judicial task imposed by these questions. Instead of undertaking a factual analysis of the direct and circumstantial evidence of the Board's intent, it employed a technique of reasoning from presumptions to reach a result dictated by the theoretical premise for those presumptions.

On the issue of segregative intent, the Court began by looking at the past instead of the present. It reasoned that the existence of segregatory acts or practices in 1954 placed the Board under an affirmative duty to diffuse black and white students throughout the school system. From this false

premise it then turned to the present condition of racial imbalance in the Dayton school population and created a presumption that such imbalance was a result of systemwide and continuing segregative intent on the part of the Dayton Board. By arbitrarily excluding all other factors, such as residential housing patterns, the Court's presumption permits a finding of a constitutional violation from a condition of racial imbalance without the necessity of a factual exploration of the evidence of actual intent. As such, it is an erroneous departure from the standards for decision-making which this Court has established.

The Sixth Circuit compounded its error in dealing with the question of intent by creating another presumption. In adopting a natural and foreseeable result test for determining intent, it simply devised a rationale for equating effect with intent. If conditions of racial imbalance resulted from Board actions, those actions – in the Court's view – were acts of intentional segregation. By arbitrarily excluding all other factors, such as a lack of feasible alternative actions, the Court's presumption once again permits the finding of a constitutional violation from a condition of racial imbalance without the necessity of a factual exploration of the evidence of actual intent.

When the distorting lenses of the presumptions created by the Sixth Circuit are withdrawn and the evidence is scrutinized in the light of the specific factors outlined in prior decisions of this Court, the conclusion is inexorable that for at least the past twenty years none of the actions of the Dayton School Board has been tainted with segregative intent.

In its determination of the second question, the Sixth Circuit completely misconstrued this Court's concept of incremental segregative effect. Instead of defining that concept from a remedial perspective as the difference between the distribution of a school population as it is and as it would have been in the absence of constitutional violations, the Sixth Circuit simply used the term as a description of a systemwide violation composed of gradual increments of isolated acts and

practices. In relegating the concept to the violation stage of judicial consideration, the Sixth Circuit infused the concept with the same presumptive reasoning that misguided its handling of the first question. If a condition of racial imbalance is presumed to be the result of intentional Board action, a condition of racial balance may be presumed as the natural condition that would have existed in the absence of such action. From this false reasoning flows a conclusion that a systemwide racial balance remedy is the proper resolution of any desegregation dispute.

Once the concept of incremental segregative effect is applied in the remedial sense in which it was originally defined by this Court, the evidence compels the conclusion that the distribution of the Dayton school population at the time this suit was filed was essentially what it would have been in the absence of any of the alleged violations by the Dayton Board. The distribution was in fact a product of residential housing patterns. The changing racial compositions of the schools in the Dayton system over the past twenty years have, without any manipulation by the Board, simply reflected those patterns. In the absence of any incremental segregative effect from Board action, the proper remedy was a dismissal of the plaintiffs' complaint.

Dismissal of the complaint was proper for jurisdictional as well as substantive reasons. Despite the fact that the issue of standing has been persistently and repeatedly raised by the defendants from the outset of this litigation, no evidence has been presented to establish that any of the plaintiffs have sustained any injury or that any of them are members of a class that has sustained any injury.

VII. ARGUMENT

On June 27, 1977, this Court in plain and unequivocal language defined the task facing the trial and appellate courts in this litigation.

> "The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977).

In accordance with this mandate, the District Judge held supplementary hearings, examined and weighed all of the evidence, issued detailed findings of fact and dismissed the plaintiffs' complaint. The Sixth Circuit reversed this decision and reinstated a desegregation plan involving forced busing to create a balance of races in each school throughout the Dayton system which reflects the ratio between the races in the system as a whole.

How can two inferior courts faced with the same set of straightforward instructions reach such diametrically opposed results? The answer, we respectfully submit, lies in the refusal of the appellate court to accept the mandate of this Court and in its dedication to a goal of securing a uniform result in

northern desegregation cases that mirrors the uniform result achieved in southern desegregation cases. It is hardly a tactical accident that the N.A.A.C.P. chose the only judicial circuit that encompasses two northern as well as two southern states for the forum in which to forge the principles applicable to school desegregation cases where no statutory dual system existed. It is equally unsurprising that this case has the dubious distinction of arriving twice before this Court on the same issues.

If these appear to be strong statements, there may yet be some virtue in plain speaking. The decisions of the Sixth Circuit in this case and its companion case from Columbus place the statements in a foundation of fact. *Penick* v. *Columbus Board of Education*, 583 F.2d 787 (1978) (*Columbus I*), *cert. granted*, — U.S. — (1979). While the technique employed by the Sixth Circuit to abandon the result required by this Court's mandate is cast in the garb of factual analysis and sophisticated legal presumptions, the force guiding that technique was first revealed in a concurring opinion issued by the author of the Columbus decision following a remand of the Detroit case in 1975:

> "I join my colleagues in the drafting and issuance of today's order because any final decision of the United States Supreme Court is the law of the land. But conscience compels me to record how deeply I disagree with the decision which we are enforcing." *Bradley* v. *Milliken*, 519 F.2d 679, 680 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

In a remarkable opinion, he went on to declare that any distinction between northern cases and southern cases was "a formula for American apartheid" and this Court's decision in the *Bradley* case was more "fraught with disaster for this country" than any Supreme Court decision since the *Dred Scott* case. *Id.* at 680-681.

In *Dayton IV* and *Columbus I*, this shout of resistance has

taken the more subtle, though still rebellious form of reworking constitutional doctrines to assure that federal courts achieve the same sociologic result in states which had no statutory or constitutional mandate for segregated schools as occurred in southern states where such mandates existed. It is the responsibility of this brief to trace the error that has been created. It is the duty of this Court to correct that error.

A. THE SIXTH CIRCUIT HAS INVENTED AND ADOPTED ERRONEOUS STANDARDS FOR DETERMINING THE PRESENCE OR ABSENCE OF SEGREGATIVE INTENT IN SCHOOL DESEGREGATION CASES.

The first task of the inferior courts in this case was to "make new findings and conclusions as to violations" in the light of this Court's opinions in *Dayton Board of Education, Washington* v. *Davis* and *Village of Arlington Heights. Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977). Instead, the Sixth Circuit attempted to determine this case in the light of novel standards which it created without reference to principles established by this Court.

1. There Is No Basis In The Constitution, In Prior Decisions Of This Court Or In Logic For The Sixth Circuit's Creation Of A Legal Presumption of Systemwide And Continuing Segregative Intent And Effect By Juxtaposing Pre-1954 Actions With A Current Condition Of Racially Imbalanced School Populations.

The primary approach of the Sixth Circuit consisted of posing and answering three questions. First, had the Dayton Board engaged in intentional segregative acts prior to this Court's 1954 decision in *Brown I*? If so, could the school system in 1954 be characterized as a dual system because of those acts. Such a characterization, according to the logic

of the Sixth Circuit, creates an affirmative duty on a school board to remove all traces of segregation from the system by diffusing the races throughout the system. The third question is therefore whether at the time of suit students were diffused throughout the system in a racially balanced pattern. If so, the system is "desegregated" and no judicial remedy is required. If not, the Board is presumed to have failed to satisfy its affirmative constitutional duty, and a federal court is compelled to intervene and bring about "desegregation".

This approach is reiterated at various points in the Sixth Circuit's opinion:

> "The record demonstrates conclusively that at the time of *Brown I*, defendants intentionally operated a dual school system and that subsequently, defendants never fulfilled their affirmative duty to eliminate the system-wide effects of their prior acts of segregation." *Brinkman* v. *Gilligan*, 583 F.2d 243, 247 (1978); A. 194a.
>
> ". . . [W]e now expressly hold that at the time of *Brown I*, defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment." *Ibid.*
>
> ". . . [T]he relevant inquiry is whether at the time of *Brown I*, or any time thereafter, defendants were operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment." *Id.* at 251; A. 201-202a.
>
> "A review of the entire record indicates that defendants have not established that the character of the school system extant in 1954 was the result of racially neutral acts." *Id.* at 252; A. 204a.
>
> "The district court's error in failing to find the defendants were operating a dual school system at the time of *Brown I* resulted also in its failure to evaluate properly the Board's post-*Brown I* actions, which must be judged by their efficacy in eliminating the continuing effects of past discrimination." *Id.* at 253; A. 205a.

> ". . . [F]or 24 years defendants have been under a constitutional duty to desegregate the Dayton public schools." *Ibid.*
>
> "Instead of meeting their affirmative duty to disestablish the dual school system extant at the time of *Brown I* and to diffuse black and white students throughout the Dayton school system, defendants pursued a policy of containment through school construction and site selection practices." *Id.* at 256; A. 212a.
>
> ". . . [D]efendants have utterly failed to comply with their ongoing 24 year obligation to desegregate the Dayton public schools. . . ." *Id* at 256-57; A. 213a.

The technique of triggering presumptions and burden-shifting principles from conditions existing in 1954 is clearly at the core of the Sixth Circuit's decision.

What is wrong with this approach? At least four separate criticisms, we submit, expose it as a product of false reasoning.

(a) The Dayton school system cannot fairly be characterized as a "dual system" in 1954 or in any other year.

(b) The year 1954 has no talismanic significance in law or in logic; the focus of judicial inquiry should be on conditions existing at the time of suit.

(c) "Desegregation" is not synonymous with "racial balance" or with "diffusion of black and white students throughout the system"; a presumption of segregative intent based on an erroneous definition of desegregation is an erroneous presumption.

(d) The Sixth Circuit's approach is a departure from the standards already established by this Court for determining the existence of constitutional violations in school desegregation cases.

For each of these separate reasons the approach adopted by the Sixth Circuit should be rejected.

The first criticism relates not to the approach itself, but to the relevance of the approach to the facts of this case. In answering its first self-imposed question, the Sixth Circuit found pre-1954 segregative practices to have existed in the Dayton school system. It then leaped to the non sequitur that an affirmative answer to this question requires an affirmative answer to the second question. In characterizing the 1954 school system as a dual system because of actions of the Dayton Board, the Court noted that in the 1951-52 school year 54.3% of the black students in the system attended four schools that were 100% black. 583 F.2d at 248-249; A. 197a. It put aside the fact that such attendance was either voluntary or a reflection of the racial composition of the neighborhoods served by the schools in question. It also conveniently ignored the fact that the other half of the black student population was attending racially mixed schools (A. 216-Ex.; *see* A. 177-Ex.).

If a dual system is one in which separate schools are maintained for black students and for white students, how can a system in which almost half of the black students attend schools in the company of white students – regardless of the percentage mix in each school – be characterized as a dual system? (*Ibid*). Even if the questions posed by the Sixth Circuit were the right questions, the answer which it gave to the second question was clearly the wrong answer. As an official of the plaintiff N.A.A.C.P. admitted in testimony given on the remand from this Court, the worst thing that can be said in retrospect about the Dayton schools is that they reflect the racial imbalance of the geographic neighborhoods they serve. (A. 526-528). Such a condition does not offend the Constitution. *See, e.g., Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 413, 417 (1977); *Washington* v. *Davis*, 426 U.S. 229, 240 (1976).

The second criticism of the Sixth Circuit's approach is that

even if the Sixth Circuit was correct in finding a dual system as of 1954, its finding should neither determine the outcome of this litigation nor trigger adverse presumptions about the intent of the Dayton Board at the time of suit. The year 1954 may have historical significance as the year in which this Court decided the landmark case of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*). That decision did not, however, create a new constitutional principle that was valid for the post-1954 era and inapplicable to the years before 1954. It interpreted the Constitution as that document had existed since the ratification of the fourteenth amendment in 1868.

It is therefore just as logical – or, we submit, illogical – for a court to focus on conditions as they existed at the time of the 1913 Dayton flood or as they existed in 1868 as it is for a court to focus on conditions as they existed twenty-five years ago in 1954. If there is some special constitutional significance to the year 1954, that significance should not diminish with the passage of time. Presumably, the decision-making process in a desegregation case filed in the year 2064 would start with an analysis of practices and patterns in existence one hundred ten years earlier. It is difficult to believe that any court would be persuaded to adopt this line of reasoning, although the constitutional logic of the Sixth Circuit's position suggests that even today a court should fix the bench mark for triggering presumptions one hundred ten years ago when the constitutional provision in question was adopted.

The issue is not what happened eight generations of high school students ago in 1954 or thirty-six generations of high school students ago in 1868. The issue is what constitutional violations existed and affected student distribution in the system at the time of suit. While examination of historical practices may be helpful in exploring these current conditions, such an examination is entirely different from seizing upon some arbitrary date in the past and drawing adverse evidentiary presumptions as a means of forcing a predetermined

outcome to the litigation. The novel approach adopted by the Sixth Circuit was first suggested in the amicus brief filed by the Department of Justice when this litigation came before this Court in 1977. It was picked up by the plaintiffs in the oral arguments presented on that appeal, and it was tacitly rejected by this Court in the opinion which remanded this case to the District Court and the Sixth Circuit. Since the approach has nothing in law or logic to recommend it, the rejection was appropriate.

The third criticism of the Sixth Circuit's approach relates to the creation of artificial and erroneous presumptions as a procedural technique for compelling predetermined results. After finding that the District Court erred "in failing to accord the proper legal significance to the facts extant at the time of *Brown I*", the Sixth Circuit found a second source of error in the District Court's alleged failure "to apply the appropriate presumption and burden-shifting principles of law." 583 F.2d at 251; A. 202a. These "principles" were created by the Sixth Circuit as a corollary to its erroneous view that the existence of segregative practices in a school system in 1954 gives rise to an affirmative duty on the part of a school board to achieve a racial balance of students throughout the system. Presumptions of systemwide and continuing intent and effect were applied to place upon the Dayton Board a burden of proof that can only be satisfied by a showing that it had achieved such a racial balance at the time suit was filed.

A legal presumption may be defined as an inference as to the truth of a proposition based on probable reasoning in the absence of actual proof or disproof. It serves no legitimate purpose in litigation other than to assist in determining true facts, and if it is not based on probable reasoning it does not deserve to be adopted as a presumption. The "presumptions" of systemwide and continuing intent and effect employed by the Sixth Circuit are not "presumptions" in the legal sense of that term; they are simply artificial tools employed to achieve a desired result. They are grounded not in probable reasoning but in an erroneous definition of desegregation.

Segregation is the separation of the races by intentional state action. In contrast, desegregation should be defined as the complete removal of such state-imposed barriers. When the Sixth Circuit speaks in terms of an "affirmative duty . . . to diffuse black and white students throughout the Dayton school system," it is creating a constitutional duty to maintain a state-imposed racial balance regardless of whatever private forces may be at work in determining the natural demographics of population distribution. 583 F.2d at 256; A. 212a. It is not necessary to debate the philosophical or social virtues or vices of a system which subjects individual freedom to state-imposed patterns of racial balance. It is sufficient to confirm that the Constitution does not require any particular diffusion of black and white students in a school system; it simply requires that no student be denied access to any school in the system on the basis of race. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971). A presumption of segregative intent based on a failure to diffuse the races has no constitutional foundation.

Such a presumption also has no foundation in facts or in common sense. To conclude that every isolated segregative act has a systemwide and continuing effect does not accord with probable reasoning; much of the historical evidence in this case was buried beyond the reach of memory until dredged up by the plaintiffs for forensic purposes. To conclude that in the absence of constitutional violations black and white students would be diffused throughout the Dayton school system does not accord with probable reasoning. Indeed, the evidence indicates that the distribution of students that existed in the system when suit was filed would have been the same even if every action of the Board in the last seventy-nine years had been racially neutral by 1979 standards.

By creating a set of presumptions and a burden of proof without recourse to constitutional requirements or factual considerations the Sixth Circuit has simply devised a tech-

nique for assuring a uniform result in any school desegregation case. The presumptions are for all practical purposes irrebuttable since the burden of demonstrating diffusion cannot be met. Neither the Dayton School Board nor any other school board in the country can satisfy the burden allegedly thrust upon it by the dead hand of the past because the demographics of population distribution will simply not produce such a diffusion in a free society.

The final criticism of the Sixth Circuit's approach lies in the fact that it is simply a frolic and detour from constitutional principles that have been firmly established by this Court. In order to prove *de jure* segregation, the plaintiffs in this case or any other case are required to demonstrate a current condition of segregation resulting from intentional state action. *Washington* v. *Davis*, 426 U.S. 229, 240 (1976); *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 205 (1973). Historical background is relevant only to the extent it sheds light on the question whether a current condition of state-imposed segregation exists. 413 U.S. at 211. The proper approach is to focus on the present, not to ignore the present and extrapolate constitutional violations from the past with the leverage of unsupportable presumptions.

2. The Sixth Circuit's Adoption Of A Natural And Foreseeable Result Test To Determine Segregative Intent Conflicts With Prior Decisions Of This Court.

While the Sixth Circuit's consideration of the question whether the Dayton school system was segregated by intentional actions of the Dayton Board was guided in large part by the set of presumptions drawn from focusing on pre-1954 practices, it was also influenced by the adoption of a natural and foreseeable result test to determine segregative intent. The authority for adopting this test was a prior opinion of the Sixth Circuit.

> "A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies." *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

By equating "effect" with "intent" this test thrusts upon a school board the task of proving the negative proposition that its actions were free of segregative intent. All of the neutral evidence before the court becomes colored by the presumption, and the Sixth Circuit simply reaches the conclusion dictated by its premise.

> "The evidence clearly establishes that the natural, probable and foreseeable result of defendants' actions was the creation and perpetuation of a dual school system." 583 F.2d at 252; A. 204a.

Like the presumptions based on the Sixth Circuit's 1954 focus, the presumption based on a natural and foreseeable result test is without legal or factual foundation. Two reasons require its rejection:

(a) since natural, probable and foreseeable results are not necessarily intended results, there is no basis in probable reasoning for a presumption of intent from such results;

(b) the factors to be considered in determining the presence or absence of segregative intent have been delineated in prior opinions of this Court, and the adoption of a result-oriented presumption of intent is an abandonment of the judicial duty to consider those factors.

Without basis in logic or law the presumption holds no justification for continued existence.

The chief reason for rejecting the presumption is the fact that it is not in accord with probable reasoning and therefore exists as little more than an artificial tool to rationalize a desired result. If the University of Dayton gets involved in a football game with the University of Alabama, the natural, probable and foreseeable result may be another Alabama victory. Does this mean that the University of Dayton intended to lose the game? If a surgeon undertakes an operation with a high risk of mortality and the patient dies on the table, did the surgeon intend to kill his patient? If a novice author attempts to write the great American novel and the natural, probable and foreseeable result of such effort is failure, is it reasonable to presume that he intended to achieve such a result?

In the context of this school desegregation case, the Sixth Circuit's presumption of intent has a particularly troubling ring of artifice. The use of the presumption is primarily directed to assignment practices, school construction and site selection. 583 F.2d at 253-257; A. 206-212a. In a community like Dayton where there is marked racial imbalance in residential housing patterns, an absolutely neutral enforcement of the statutory policy contained in section 3313.-48 of the Ohio Revised Code – a policy of providing education "at such places as will be most convenient for the attendance of the largest number" of students – will inevitably result in racially imbalanced schools.

Viewed from the Sixth Circuit's presumption of intent from effect, the same neutral practice becomes a breach of the Constitution. The natural effect of building a school where the black population is concentrated is a school predominantly attended by black students. The natural effect of building a school where the white population is concentrated is a school predominantly attended by white students. Since "effect" and "intent" are synonymous under the Sixth Circuit's presumption, a school board is guilty of

intentionally segregating the races when it follows the state statute.

The outcome of any desegregation case is foredoomed in any neighborhood school system in a community that does not display residential racial balance. Since communities reflecting residential racial balance are virtually unknown in this country, it is not difficult to predict the outcome of any desegregation case to which the Sixth Circuit presumptions are applied. There is a double-barreled effect at the point where the presumption of intent from effect overlaps with the presumption of a continuing affirmative duty to diffuse the races throughout a school system when segregative practices have been found to have existed at some point in the history of the system.

The plaintiffs' chief expert carried the foreseeability argument to the point that any act of a school board which achieves anything less than a racial balancing of students throughout the system is an intentional act of segregation. (A. 474-475) This argument rests on the concept that it is foreseeable that white students will migrate or leave a school system unless they have no means of escaping a racially-mixed school situation. Not only is the building of a school or school addition in a black residential area or in a white residential area an act of intentional segregation; building a school in a racially-mixed area is an intentional segregative act since the existence of such a mix will encourage white students to leave the area. Under a presumption of intent from foreseeable effect, any act on the part of a school board which falls short of attaining systemwide racial balance thus becomes an intentional segregative act.

The Sixth Circuit, in applying its artificial presumption, neglected to examine the evidence that there were no reasonably feasible alternatives to the actions taken by the Board. If the Board was faced with simple choices between school sites or expansion that would mix the races and school sites or expansion that would result in racial separation, a consistent following of the latter choice could justify the draw-

ing of an adverse inference of segregative intent. It was apparent, however, from the evidence that because of the residential racial imbalance in the system the only alternative to the Board's consistent policy of building schools "where the children are or where they are expected to be" was the adoption of a systemwide busing plan (A. 292-294).

Wherever the Board had a feasible option of reducing racial imbalance – as in the opening of Roth High School in 1959 with a mix of black and white students that approximated the systemwide ratio (A. 208-209, 311-312, 389) or in the alteration of the Willard, Garfield and Wogaman attendance boundaries in 1952 for the purpose of placing more black students in integrated school environments (A. 340, 388-389; A. 323-324-Ex.; R. I. 1181, Vol. 11). – its actions in following the integrative options were ironically seized upon by the plaintiffs as proof that anything short of a systemwide racial balance is inadequate (*see* A. 303-304). The immediate integrative effect of the 1952 boundary alterations was ultimately frustrated by shifting populations (A. 324-Ex.) and the same forces ultimately rendered Roth an all-black high school (A. 312).

Whatever their implications for a social policy of systemwide racial balance may be, these examples and others graphically demonstrate that intent and effect are not in reality synonymous. A legal presumption of intent from effect has no more basis in probable reasoning than a presumption based on Robert Burns' observations concerning the best-laid plans of mice and men.

The Sixth Circuit is not alone in attempting to bypass the standards established by this Court for determining segregative intent. A foreseeable effect test has also been adopted in the Second Circuit, the Fifth Circuit and the Eighth Circuit. *See, e. g., Hart* v. *Community School Board of Education, New York School District,* 512 F.2d 37 (2nd Cir. 1975); *United States* v. *Texas Education Agency,* 564 F.2d 162 (5th Cir. 1977); and *United States* v. *School District of Omaha,* 565 F.2d 127 (8th Cir. 1977), *cert. denied,*

434 U.S. 1064 (1978). The Ninth Circuit, on the other hand, appears to have honored the rejection of such a test by prior decisions of this Court. *See, e. g., Johnson* v. *San Francisco Unified School District,* 500 F.2d 349, 351-52 (9th Cir. 1974); *Berkelman* v. *San Francisco Unified School District,* 501 F.2d 1264, 1266 n. 3 (9th Cir. 1974).

The Sixth Circuit's foreseeable result test is nothing more than the return under a new name of the impact test which was rejected by this Court in *Washington* v. *Davis.*

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause." *Washington* v. *Davis,* 426 U.S. 229, 240 (1976).

Any doubt that may have unjustifiably lingered in the mind of any jurist subsequent to this decision should have been laid to rest by the decision of this Court in *Village of Arlington Heights.*

> "Our decision last Term in *Washington* v. *Davis* . . . made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 264-265 (1977).

Whether the presumptive shortcut to the desired result be phrased in terms of impact, result or effect, it has been properly rejected by this Court in favor of a straightforward analysis of the evidence presented on the determinative issue of intent.

> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266.

The architecture of artificial presumptions created by the Sixth Circuit should be dismantled. The District Court's sensitive handling of the "difficult task" of making "complex factual determinations" should be reinstated according to the tests established by this Court.

> ". . . [T]hat is what the Constitution and our cases call for, and that is what must be done in this case." *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 420 (1977).

3. Application Of The Standards Established By This Court For Determining The Presence Or Absence Of Segregative Intent To The Facts Of This Case Justifies The Findings Of The Trial Court.

In holding squarely that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause" this Court in *Arlington Heights* spent three pages outlining the kinds of factors to be considered in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 266-268 (1977). Intent is not racially disproportionate effect warmed over. It involves "state contrivance to segregate" and "a purposeful device to discriminate." *Washington* v. *Davis,* 426 U.S. 229, 240, 246 (1976).

The Dayton Board contends that its intent has been to pursue a racially neutral policy of placing schools where the children are or where they are expected to be in accordance with the directive of section 3313.48 of the Ohio Revised Code. The location of schools on the basis of such a criterion has been upheld, and it is certainly a rational criterion. *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967). Indeed, if any presumption is to be indulged in this area, it should be a presumption that the Dayton Board is complying with the state law.

> ". . . [T]he state of Ohio requires that the Board of Education shall provide free education 'at such places as will be most convenient for the attendance of the largest number thereof.' R. C. Section 3313.48. The presumption that the Board has safely adhered to the Ohio statutes will control until rebutted." *Craggett* v. *Board of Education of Cleveland City School District, Cuyahoga County, Ohio,* 234 F. Supp. 381, 386 (N.D. Ohio, *aff'd,* 338 F.2d 941 (1964).

The plaintiffs on the other hand contend that it was the intent of the Dayton Board to secure wherever possible a forced separation of the races in the Dayton school system. Their argument rests largely upon the application of a racial balance theory under which any action short of the achievement of systemwide ratios between black and white students in each school is perceived as having a segregative effect and on the invocation of adverse presumptions drawn from that theory. When the erroneous standards created by the Sixth Circuit are replaced by the factors set forth in *Arlington Heights,* the plaintiffs' contentions as to segregative intent collapse.

Is there "proof that a discriminatory purpose has been a motivating factor" in the actions of the Dayton Board? Whenever any purpose other than convenience of access emerges unequivocally from the evidence, the purpose is one of improving racial balance. The examples of the alteration of attendance boundaries at Willard, Garfield and Wogaman schools in 1952 and the building of Roth High School in

1959 have already been cited. Had the Board been acting with a motivation of keeping blacks confined to black schools, the natural choice in 1952 would have been the selection of a proposed plan for placing additions onto Willard and Garfield schools. Such an action would have had the effect of locking in the blacks at Willard and Garfield, and it certainly would have been classified by the plaintiffs as "segregatory" in nature (*see* A. 339). Had segregative purpose or intent been behind the construction of Roth, the Dayton Board could have built a small high school and placed an addition onto Roosevelt, thereby providing a "white Roth" and locking in the blacks at Roosevelt (A. 315). Instead Roth opened with a student population which was 75% white and 25% black – the approximate systemwide ratio of black and white students at the time (A. 208-209).

Likewise, the Board in 1967, when presented with a conscious choice between alternatives, chose the alternative designed to prevent rather than promote racial separation by locating Jefferson Primary on the site of Jefferson Elementary School, rather than in Lower Dayton View (A. 373-374). Had the new school been located in the Lower Dayton View area, the result would have been a "whitening up" of Jefferson Elementary with the concomitant probability of the opening of a new all-black school (*see* A. 373-374). The same intent to improve racial mix while preserving the concept of neighborhood schools is reflected in the Board's 1969 revision of attendance boundaries for Stivers High School in order to achieve a greater degree of integration at that school (A. 99-100, 219, 310-311).

The plaintiffs can only respond to these and other actions by arguing that they fell short of achieving a systemwide racial balance or that their immediate effect was frustrated by shifting populations. Such arguments do not alter the actions as unequivocal evidence of the Board's non-segregative intent. Even Dr. Carle, the plaintiffs' chief witness at both the original trial and at the 1977 rehearings, admits that the 1952 "West Side Reorganization" was a result of an

intent not to segregate but to improve the racial mix of students in as many schools as possible (A. 340, 468, 481). Typically, he then uses this example of the Dayton Board's non-segregative intent as support for his contention that racial imbalance has to be approached on a systemwide basis. In his view, the presence of white areas elsewhere in the system permitted frustration of the Board's intent through population movements (A. 467-469). Yet he concedes that there have been no significant changes in school boundaries and attendance zones for some twenty years (A. 472). It necessarily follows that the changing populations of the schools came about in spite of rather than because of Board action.

Application of the other tests verbalized in *Arlington Heights* leads to the same conclusion that the Dayton Board's actions have been free from segregative intent. Is there evidence that the impact of the Board's official actions "bears more heavily on one race than another"? The plaintiffs did not demonstrate any inequality of facilities, instruction and curricula opportunities in the system (A. 30a). The policies of the Board with respect to site selection, construction and attendance zones were applied impartially across the system (A. 307, 368, 391). The evidence thus eliminates this factor from consideration.

There is also a total absence of "a clear pattern, unexplainable on grounds other than race." The Board simply followed a neutral policy of putting the schools where children were or where they were expected to be (A. 368-369). It refrained from manipulating or gerrymandering attendance boundaries as the population in the district grew from 19% black in 1951-52 to 44.6% black in 1972-73 (A. 309; *see* A. 326-Ex.). The inescapable fact that school attendance boundaries had remained essentially stable in the school system for twenty years before the filing of this suit while residential and school populations shifted and changed is overwhelming evidence against any claim that the Board's actions were motivated by segregative intent. If such were

the case, the Board would have changed attendance boundaries to eliminate the mixed schools that invariably marked the frontiers of Dayton's expanding black residential population. It did not so act. The record thus demonstrates a clear pattern, unexplainable on grounds other than neutrality.

Does the evidence reveal "a series of official actions taken for invidious purposes"? As the District Court found, the only Board actions that could be characterized as segregative were isolated acts or practices that dated back to periods ranging from twenty to sixty years before the filing of suit. This finding was confirmed by the testimony of a distinguished black witness who was presented by the plaintiffs at the 1977 remand hearings, not as an advocate from the ramparts, but as an impartial historian who had made a thorough study of the facts relevant to this litigation.

> "Q. . . . Would you relate such instances of segregation in the Dayton Public School System since 1954? "A. Well, there really isn't that much since 1954." (A. 519).

For more than twenty years before the filing of this suit the schools simply reflected the racial composition of the neighborhoods they served. Except for isolated acts, the significance of which has long since been dissipated by the passage of time, the Dayton Board has never taken any actions for purposes that could by current standards be deemed "invidious".

Were there "departures from the normal procedural sequence" that "might afford evidence that improper purposes are playing a role"? No evidence is offered to refute the Trial Court's findings of fact that attendance zones in the Dayton system are not irregular, that they have remained essentially stable, that boundaries have not been changed or altered to channel blacks or whites into specific schools or to restrict blacks from attending any schools or for purposes of creating a white or a black school, and that boundary lines have not been gerrymandered notwithstanding the fact that student body compositions in many schools have changed from predominantly white to predominantly black (A. 5-6a). Optional zones were scattered throughout the system in a pattern that refutes any claim that any racial significance any of them may have had was anything other than coincidental (*see* A. 310, 321). There simply were no significant departures from the racially neutral policies of the Board except as a result of efforts to improve racial balance.

What light does "legislative or administrative history" shed on the question whether racially discriminatory intent directed the actions of the Dayton Board? We have already noted that in every instance where it was presented with conscious alternatives that fell within its neighborhood school policy the Board opted for the alternative that would improve racial balance. While the plaintiffs from the sophisticated vantage point of the 1970's may attempt to make light of the administrative history expressing the Board's intent in 1952 to provide through boundary changes an increased opportunity for interracial learning experiences or the policy of "dynamic gradualism" expressed in the same period with respect to assignment of white teachers to schools in black areas and black teachers to schools having white or mixed populations, these items of administrative history are clear indicia of the Board's long-standing concern over problems of racial isolation and its intent to overcome such problems wherever feasible without sacrificing its neighborhood school system.

When we turn from an examination of the evidence under the *Arlington Heights* tests to the basis offered by the Sixth Circuit for its findings in *Dayton IV* of "post-1954 actions which actually have exacerbated the racial separation existing at the time of *Brown I*," it is apparent that the findings are simply an example of using presumptions as self-fulfilling prophesies. The findings are organized by the Sixth Circuit in three categories – faculty and student assignment practices, school construction and site selection,

grade structure and reorganization. 583 F.2d at 253-256; A. 205-214a.

The Sixth Circuit's discussion of faculty and student assignment practices is largely a blending of artificial presumptions of segregative intent with the fact of racial imbalance in the schools. When the erroneous presumptions are removed from this analysis, all that remains is racial imbalance — a condition that even the Sixth Circuit grudgingly recognizes as "not in itself a constitutional violation." 583 F.2d at 249; A. 197a.

The only specific facts to which the Court refers in this section of its discussion, aside from statistics showing racial imbalance, involve the closing of Willard and Garfield elementary schools in 1962 at the time of the conversion of the old Dunbar high school building into MacFarlane Elementary School and the opening of the new Dunbar High School. This situation is not offered as evidence of segregative intent, but simply as an opportunity for applying an adverse presumption. In fact, as the Trial Court had noted, the entire population in the area of these schools was black at the time in question and there was no occasion for the Board to achieve a racial mix by any actions short of adopting some form of cross-town busing (A. 170a).

With regard to faculty assignment the Sixth Circuit's analysis of post-*Brown* "violations" is largely silent. This silence stems from a recognition of the fact that three years before *Brown I* the Board had expressly replaced its practice of assigning black teachers to black schools with a policy of "dynamic gradualism" under which black teachers began to receive teaching assignments in white and mixed schools (A. 176-Ex., 187-189-Ex.). This unequivocal expression of non-segregatory intent was substantially implemented in the twenty-year period between its adoption as Board policy and the filing of this lawsuit. In a curious footnote, unsupported by any reference to the record, the Sixth Circuit states that "[e]ven at the time this action was instituted, it was possible to identify a 'black school' in the Dayton school

system without reference to the racial composition of the students." 583 F.2d at 253, n. 49; A. 207a. In fact, at the time this suit was filed faculty assignments were made in such a manner that each school reflected the racial balance of the district as a whole (A. 226). [3]

Without reference to any specific facts in the record, the Sixth Circuit concluded that the Dayton Board had used "optional attendance zones for racially discriminatory purposes in clear violation of the Equal Protection Clause". 583 F.2d at 255; A. 210a. Once again the Sixth Circuit's erroneous presumptions point in one direction and the actual evidence points in the opposite direction. While the District Court in its decision following the original trial found that a few of the optional zones could have had a cumulative effect on conditions of racial imbalance, this Court raised a question as to whether even those zones reflected the presence of discriminatory intent.

> "The District Court's finding as to the effect of the optional attendance zones for the three Dayton high schools, *assuming that it was a violation under the standards of Washington* v. *Davis, supra,* appears to be so only with respect to high school districting." *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 413 (1977) (emphasis supplied).

The only factual evidence presented at the post-remand hearings which was truly supplementary to the evidence already before the District Court was the testimony of Dr. Treacy. By utilizing block census data Dr. Treacy was able to gather detailed information relating to the optional zones in question (A. 497-513). This evidence narrowed the inquiry to the Roosevelt-Colonel White optional zone. While the zone in its early period may have permitted some whites

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[3] The Trial Court's findings on the subject of faculty and staff assignments together with supporting references to the record are found at A. 4a and 151-154a. *See* A. 278-289-Ex.

to attend predominantly white Colonel White instead of Roosevelt, its ultimate effect was to permit blacks to attend Colonel White and provide a significant racial mix in the student population at that school (A. 507).

If the reason for establishing the zone was segregative instead of the assigned reasons of access, safety and convenience, the Board would have modified or abolished the zone when it began serving an integrative rather than a segregative purpose. Its failure to do so is demonstration of the fact that this zone, like the similar zones that uniformly appeared at midpoints between schools throughout the system, was not adopted with any intent to segregate the races (A. 514). Indeed, the undisputed evidence is that racial considerations never played a role in the establishment of optional zone attendance boundaries in the Dayton system (A. 391).

The Sixth Circuit's comments on the second category of post-*Brown* "violations" – school construction and site selection – also turn on presumption and effect rather than on evidence of segregative intent. 583 F.2d at 255-56; A. 210-212a. In emphasizing the number of new schools and additions which opened with a predominantly one-race racial composition, the Court simply pointed out that such openings maintained racial isolation in the system and attempted to reinforce its presumptive conclusion of segregative intent by referring to the pre-1951 practice of assigning black teachers to teach only in black schools. It ignored the abandonment of that practice in 1951, and, even more significantly, it ignored the absence of any feasible alternative to the pattern of school construction and site selection which it observed.

The fact that their student compositions reflected the racial composition of the neighborhoods they served does not offset the fact that schools were built accordingly to racially neutral criteria. The Dayton Board of Education has consistently, uniformly and impartially located school buildings in areas where students and potential students re-

sided so that the buildings would be most convenient for the attendance of the largest possible number of students (A. 368-369). In addition to selecting sites in the areas of the heaviest concentrations of students and potential concentrations of students, the Dayton Board has properly taken into account such factors as safety of access, proximity of city parks and economics of land acquisition (*Ibid*). Likewise, construction of additions to existing school buildings has been accomplished without regard to the race of students affected. Such construction has occurred wherever and whenever increased population density required more classroom space and the building of a new school could not be justified (A. 376).

When comparing construction and site selection practices in Dayton to those utilized in other systems, it is readily apparent why the District Court found that school construction and site selection were not motivated by segregative intent (A. 7a). For example, in the Pontiac case, the evidence disclosed that the criteria verbally espoused by the Board resulted in inconsistent applications when applied to the various schools. *Davis* v. *School District of City of Pontiac, Inc.*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971). In the Denver case, an elementary school was built with conscious knowledge that it would be segregated. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 201-02 (1973). In the Detroit case, the Board admitted that in one instance "it purposefully and intentionally built and maintained a school and its attendance zones to contain black students." *Bradley* v. *Milliken*, 484 F.2d 215, 222 (6th Cir. 1973).

The testimony of the witnesses Lucas and Harewood, who appeared as impassioned advocates for the plaintiffs at the hearings following this Court's remand, ironically confirmed the Trial Court's conclusion that the Dayton School Board was innocent of any intent to segregate in its policies of school construction and site selection. While both witnesses were quick to see racial implications in every action taken

by the Board, both conceded that given the population pattern of the City of Dayton there were only two conceivable alternatives to the building and attendance policies which the Board followed consistently for twenty years before the filing of this suit. One alternative was to scrap all of the school buildings in the district in favor of a single downtown campus; the second alternative was to employ some technique of cross-town busing to achieve an artifical mix of the races in each school (A. 540-541, 545-547). There was no evidence that either of these alternatives was ever economically or logistically feasible, or that either was ever presented for consideration at any relevant time.

In fact, the witness Lucas – who as president of the Dayton School Board had confirmed by vote as late as January of 1971 that he saw no alternative to the neighborhood school – admitted that he did not consider either of these alternatives feasible until he got into the planning stages of this litigation (A. 538-541).

> "If you will recognize the events that took place from January '71 until August of '71, my belief about, say, a concept of neighborhood schools was not really solidified until these events finally came in, but all of us at that time agreed that we saw no other alternative, and we publicized that on a unanimous basis." (A. 540).

To brand as a "segregative act" the failure of the Dayton Board to adopt extreme and expensive "alternatives" that were never suggested to it, considered by it or adopted elsewhere in the country as viable policies during the relevant time period is neither realistic nor fair.

Mr. Lucas ultimately had to admit that his claim of segregative intent was no more than the view of neutral actions he obtained through Emerald City spectacles. Early in his testimony he conceded that "being a black person sees this, in my judgment, from a different point of view" (A. 535). On his deposition a week prior to the December, 1977 remand hearing, he candidly stated that "[w]hen I said the

Board made certain decisions that were just automatic, it was never intended by a single Board member to be doing it to separate the races" (A. 548). Coming from the lips of one of the plaintiffs' most committed advocates in a case which turns not on the perceived effect but on the purposeful intent of actions, this statement is – we respectfully submit – a telling admission.

The testimony of the Executive Secretary of the Dayton branch of the N.A.A.C.P. was equally damaging to any argument of purposeful segregative intent (A. 522-530). This executive admitted that during her thirty year tenure she was a watchdog of the Dayton school system on behalf of the plaintiff N.A.A.C.P. and that she has been deeply involved on its behalf in this litigation (A. 527). Yet she could only cite three occasions in thirty years on which the N.A.A.C.P. had objected to practices or proposals of the Dayton Board (A. 523-524). The most recent of these objections came more than twelve years before this suit was filed (A. 525-526). The Board responded quickly and favorably to the N.A.A.C.P.'s objections on two out of the three occasions; on the third occasion the N.A.A.C.P. withdrew its objection (A. 524-527). Except for this withdrawn objection, there was no evidence that the N.A.A.C.P. had ever objected to sites selected by the Board for placing schools or additions, and even in this one instance there was no evidence that any alternative was presented to the Board.[4]

The final category of post-*Brown* "violations" cited by the Sixth Circuit – grade structure and reorganization – relates to the establishment of a middle school system in the 1971-72 school year. 583 F.2d at 256; A. 212-213a. Again, the Court has simply substituted effect for intent through the application of erroneous presumptions. As the Trial Court pointed out, and as the plaintiffs conceded, there was evi-

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[4] The Trial Court's findings on the subject of school construction and site selection together with supporting references to the record are found at A. 7a and 173-180a. *See* A. 368-369, 376.

dence that the effect of the middle schools was in some areas integrative and in some areas segregative (A. 236-237). There was, however, no evidence of any segregative intent with respect to the establishment of those schools. The Sixth Circuit's finding of such intent is the artificial product of a purported duty of the Dayton Board to diffuse the races throughout the school system.[5]

When the erroneous legal concepts which guided the Sixth Circuit's consideration of this case are replaced by the factors for determining segregative intent enunciated by this Court in *Arlington Heights*, the Trial Court's findings on that subject emerge as compelled by the weight of the evidence presented. To consider them as failing to satisfy applicable standards for appellate review is to reallocate the role of the trier of facts to reviewing courts and to replace facts with theories.

Rule 52(a) of the Federal Rules of Civil Procedure is clear, concise and free from ambiguity:

> "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Application of the "clearly erroneous" standard requires appellate courts to "constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Appellate authority in reviewing the findings of a trial court "is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." *Ibid.* Under Rule 52 (a) the question for appellate review is not whether the reviewing court "would have made the findings the trial

[5] The Trial Court's findings with respect to the middle schools appear at A. 6a and 157-158a. *See* defendants' exhibit AW; A. 236-237.

court did." *Ibid.* Rather, the question is whether "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ibid; United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

This Rule 52(a) standard applies to factual inferences drawn from documents or undisputed facts as well as to those cases in which the District Judge heard no live testimony during the course of the trial. *United States* v. *United States Gypsum Co., supra* at 394; *Ingram Corp.* v. *Ohio River Co.*, 505 F.2d 1364, 1369 (6th Cir. 1974); *United States Steel Corp.* v. *Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970). In this case, in addition to the documentary evidence, approximately forty-one live witnesses testified during the November 1972 and 1977 hearings. This testimony accounts for a verbatim record in excess of 2,500 pages. Much of the testimony was raw opinion testimony of witnesses who had obvious ideological motivations to secure a specific result. The role of the Trial Court in evaluating such testimony should not be understated, and it should not be subordinated to the desire of an appellate court to secure a preordained result.

The Trial Court's findings cannot be cast aside as "clearly erroneous". They were in fact grounded in substantial evidence revealing a system in which "the 'neighborhood school' concept . . . has been maintained free of manipulation." *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 212 (1972). The plaintiffs have failed to demonstrate any segregative intent under the tests set forth in *Arlington Heights*. Their case accordingly fails.

B. THE SIXTH CIRCUIT HAS INVENTED AND ADOPTED ERRONEOUS STANDARDS FOR DETERMINING THE SCOPE OF THE REMEDY IN SCHOOL DESEGREGATION CASES.

If an application of appropriate standards to the evidence justified a finding of any constitutional violations by the Dayton Board, the lower courts were faced with a very specific and clearly defined task.

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there by a systemwide remedy." 433 U.S. at 420.

As at the violation stage of its deliberations, the Sixth Circuit elected at the remedy stage to evade rather than apply the standard established by this Court.

1. The Sixth Circuit's Misconstruction Of The Concept Of Incremental Segregative Effect Is A Clear Departure From The Holding Of This Court In Dayton.

Whatever the complexities of performing the remedial task set forth by this Court may be in any given case, the nature of the task itself is easily understood. On one side of the scales of justice a court must place the racial distribution of the school population as it exists; on the other side of the scales the court must place the racial distribution as it would have existed in the absence of constitutional violations by the Board; the function of the constitutional remedy is to bring the scales into balance so that the "incremental segregative effect" of the Board's actions is removed and "what would have been" becomes "what is."

This approach to remedy is so easily understandable and so clearly in accord with traditional equitable principles that the complete misconstruction of the approach by the Sixth Circuit is difficult to fathom. Instead of accepting a definition of "incremental segregative effect" as the difference between conditions existing in the presence of constitutional violations and conditions which would have existed if those violations had not occured, it redefined the concept in terms of a process leading to existing conditions.

> "The word 'incremental' merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is 'incremental' in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution." 583 F.2d at 257; A. 214-215a.

Little can be said about this redefinition except that it has absolutely no relationship to the concept of "incremental segregative effect" expressed by this Court.

The interpretation of the concept by the District Court — an approach flatly and emphatically rejected by the Sixth Circuit as invalid — is, we submit, the only rational interpretation which the language of this Court's mandate is capable of yielding.

> "As explained by the Supreme Court, it stands as a more precise formulation of the principle that 'the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation.' . . .

> We read this language as imposing a burden upon the plaintiffs to prove the effect of any purposeful segregative act, not merely on a theoretical basis but on a factual basis." (A. 146a).

Just as a plaintiff in any civil case must in the first instance carry the burden of establishing both a civil wrong and a causal connection between that wrong and some damage to the plaintiff, the plaintiff in a case of this nature must in the first instance carry the burden of establishing both constitutional violations and the incremental segregative effect of those violations.

This Court's phrasing of the issue is in terms of an affirmative plaintiff's burden – a showing of the effect of the violations on the racial distribution of the school population as presently constituted. If a negative defendant's burden were intended, the task would have been phrased in terms of demonstrating that the racial distribution would not have been significantly different in the absence of the violations. The burden-shifting principles established in *Keyes* apply only to the violation stage of a case. The question of incremental segregative effect is not reached until that stage has been passed and a constitutional violation has been found to exist. If this Court intended to place the burden of proof on causation and remedy in some manner other than in accord with the traditional principles governing non-desegregation cases, it would have said so.

There is nothing novel in this interpretation; it follows from the precise language used by this Court and reflects elementary and long-established principles of jurisprudence. In redefining "incremental segregative effect" and finding that the District Court erred in allocating the burden of proof on that issue, the Sixth Circuit has confused the issue of remedy with the issue of violation. It uses the term not to describe the existing conditions to be addressed by an equity court – the correct remedial perspective – but simply to describe

a snowballing process in which isolated segregative acts or practices are rolled together into an ultimate cumulative violation.

This conceptual fusion of the violation and remedy stages of the case leads the Sixth Circuit to infuse the remedial issues with the same presumptions and burden-shifting concepts that distorted its analysis of the question of segregative intent. As a result, it finds itself rationalizing a sweeping remedy that transforms "what is" not into "what would have been" in the absence of constitutional violations, but rather into "what should have been" in an ideal system of racial balance.

In discussing the allocation of the burden of proof on the issue of incremental segregative effect, the Sixth Circuit reasserts its view that once segregative practices are found to have existed in 1954 there is a "presumption that the current racial composition of the school population reflects the systemwide impact of those violations." 583 F.2d at 258; A. 216a. If this presumption makes any sense, its unspoken corollary becomes a presumption that but for the systemwide impact of constitutional violations there would have been a homogenous distribution of black and white students throughout the system. Unfortunately, the Sixth Circuit's presumptions with respect to the causes of the current racial composition of schools are as divorced from an underpinning in probable reasoning as its presumptions of segregative intent derived from its creation of an affirmative duty to diffuse black and white students throughout the system.

Where evidentiary analysis is replaced by a technique of reasoning from presumptions, the premises for the presumptions rather than true facts will inevitably dictate the outcome of the decision-maker's efforts unless the presumptions are grounded in probable reasoning. Any set of facts in this racially unbalanced world when viewed in light of the Sixth Circuit's artificial presumptions will for this rea-

son, we submit, result in a finding of constitutional violations and the justification for a systemwide racial balance remedy. Under the pattern of those presumptions, the placement of the burden of proof becomes outcome-determinative and a uniform result in all desegregation cases is assured.

The key feature of all of the presumptions by which the Sixth Circuit would have such litigation judicially determined is a comparison between a school system as it exists and a school system in which a systemwide racial balance of students has been accomplished. Such, however, is not the comparison made by *Dayton* and prior decisions of this Court. The bench mark is the racial distribution of students that would in fact have existed in the absence of constitutional violations by a board of education, not the racial distribution that would exist in some ideal model for a racially balanced school system.

The imposition of a systemwide racial balance plan in the absence of any evidence to suggest that black and white students would have been diffused throughout the school system if no constitutional violations had ever occurred is in direct opposition to the reasoning expressed in *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976). As stated in *Austin*, which was cited with approval in *Dayton*, there must be evidence "in the record available to us to suggest that, absent those constitutional violations, the . . . school system would have been integrated to the extent contemplated by the plan." 429 U.S. at 994.

Man may indeed be the only animal that laughs or cries because he is the only animal that knows the difference between what is and what ought to be. We respectfully submit, however, that the judicial function cannot be viewed as a means of establishing an ideal system any more than it should be viewed as a means for eliminating human laughter and tears. The competence of courts lies in their ability to redress specific violations of specific laws or constitutional provisions in specific cases. Attempts to achieve more than this can produce little more than frustration, confusion and an unstable legal system that reflects little more than society's changing views of whatever the ideal may be.

2. Application Of This Court's Standard Of Incremental Segregative Effect To The Facts Of This Case Justifies The Findings Of The Trial Court And Requires A Dismissal Of The Plaintiffs' Complaint.

Whatever may be the explanation for the Sixth Circuit's failure to grasp this Court's concept of incremental segregative effect, the concept as expressed by this Court remains the standard to be applied at the remedial stage of this litigation. Likewise, while the issue whether the burden at the remedial stage is a plaintiff's burden of proving incremental segregative effect or a defendant's burden of proving an absence of incremental segregative effect may be a significant issue for guidance of lower courts in other cases, it is not an issue on which the outcome of this litigation should be deemed to turn. This is not a case where whoever bears the burden of proof is condemned to lose. The evidence presented leaves no room for legitimate dispute concerning what the racial distribution of the Dayton school population would have been at the time of suit in the absence of alleged constitutional violations by the Board. *See Bradley* v. *Milliken*, 460 F.Supp. 299, 300 (E.D. Mich. 1978).

Two basic aspects of the evidence demonstrate that the present racial distribution of the Dayton school population is a result of residential patterns and that the distribution has not been affected by any actions of the Dayton Board:

(a) during the last sixty years the main concentration of the black residential population of Dayton has expanded geographically in a clearly defined and natural manner;

(b) actions of the Dayton Board have not created a barrier to this expansion, and changing school populations have in fact reflected the changing racial compositions of the neighborhoods served by those schools.

There is no difference – no incremental segregative effect – between the distribution which exists and the distribution which would have existed in the absence of Board action. There is therefore no basis for a systemwide remedy or for any other remedy.

Analysis must start with a map of Dayton (A. 341-Ex.). The Great Miami River is a natural barrier dividing the downtown area of the city from the residential areas to the north and to the west of that commercial center. The area west of the river is in turn separated from the north by the natural barrier of Wolf Creek which flows in a southeasterly direction to join the Miami at the northern edge of the downtown area (R. I. 501, Vol. 5). In addition to the Great Miami River, the downtown area itself separates the west Dayton residential area from the residential area on the east side of the city.

The residential pattern on this map has historically been anything but a patchwork quilt. After the great Dayton flood of 1913, the black population moved out of the inner city and went to the west side of the river where there was higher ground (A. 139). Since that time, the black residential population of Dayton has been concentrated on the west side of the Great Miami River and the white residential population of Dayton has been concentrated on the east side of the downtown area. The area to the north of the downtown area has been an area where the residential patterns have at an accelerating pace changed from predominantly white to predominantly black in a movement northward from the historical concentration of the black population on the West Side (*See* A. 306-309-Ex.). The area to the south of downtown Dayton

is an area of commercial development between the river and Main Street which bisects the city.

The pattern of black residential expansion in Dayton over the past sixty years has thus been a natural radiation from a center of concentration into the only adjacent residential areas, the areas west, northwest and north of the Great Miami River and the center of the city. This pattern, given the geographic grid of the city, is – we submit – a perfectly natural pattern of growth and expansion. There is nothing to indicate that there has been any gerrymandering or carving out of islands of white population as the black population of the city increased and expanded geographically from its historic center of concentration. Nor is there anything to indicate that this pattern of racial distribution would have been any different if any action of the Dayton Board which could conceivably be labeled an act of intentional segregation had not taken place.

When analysis passes from the geography of the system and historical residential patterns within the system to attendance patterns at the Dayton schools, it becomes clear that the flow of effect has always been from neighborhood to school rather than from school to neighborhood. This conclusion is graphically demonstrated by a comparison of the exhibits showing black enrollment by schools with a map showing the geographic locations of those schools within the Dayton school system and with maps showing racial percentages by census tract within the city (*Compare* A. 275-276-Ex., 290-Ex., 321-322-Ex. *with* A. 306-309-Ex.).

Willard, Wogaman and Garfield elementary schools were located in the original center of the black residential population in 1950-1951, and they predictably had an all-black student population in those years (A. 215-Ex.). As the black residential area expanded from this center, the surrounding schools reflected the changing neighborhood. The percentage of black students at Edison expanded from 43% in the early 1950's to 80% in the early 1960's and over 95% by the end of that decade (A. 275-276-Ex., 290-Ex.). Defendants' exhibits AI(b) and

AR show the same pattern in the other schools located in this changing area. Jane Adams went from 30% black in the early 1950's to 41.6% black by the early 1960's and close to 80% black by the end of that decade (*Ibid*).

During the decade from 1952 to 1963, other schools in the path of the black residential expansion – Miami Chapel, Louise Troy, Highview, Carlson, Jackson, Weaver, Irving, Grace A. Greene, McNary, Westwood, Residence Park – became predominantly black schools. At the start of that decade, Weaver was 69.9% black; Irving was 27.3% black; Jackson was 26.2% black. Of the schools in the next geographic tier from the core of the black residential population in 1952, Grace A. Greene had been only 7.8% black; Westwood had been only 0.1% black; and Residence Park had an entirely white student population (*Ibid*). The pattern is obvious. The expansion of the black residential community is simply reflected in the changing composition of the Dayton schools.

During the next decade, the same pattern continued as the black residential area continued to expand to the north. The schools located north of the band composed of Grace A. Greene, McNary, Westwood and Residence Park are Gardendale and the twin Jefferson schools. In 1963, Gardendale opened with a 7.9% black student composition and the Jefferson schools opened with a 1.2% black student composition; by 1967 as the northward expansion of black residential population continued, these figures changed to 25.6% for Gardendale and approximately 50% for each of the Jefferson schools; by 1969 the Gardendale figure was 43.3% and the Jefferson figures were 60.1% and 57.1%; by 1972 the figures had continued their gradual expansion to 78.9% at Gardendale and approximately 94% for each of the Jefferson schools (*Ibid*). If Board actions were having an incremental segregative effect on racial imbalance, how can any court account for the graphic demonstration of these statistics that the schools did nothing more than provide a mirror image of the racial compositions of the neighborhoods they served?

The next tier of schools to the north – Hickorydale, Gettysburg, Fairport and Fairview – demonstrate the same pattern. In 1967 two of these schools had no black students and the other two were 1.1% and .3% black, respectively. Five years later, as a combined result of the Board's freedom of enrollment policy and further gradual northward expansion of the city's black residential population, the black student compositions of the four schools were 32.5%, 22.7%, 59.1% and 14.6%, respectively (*Ibid*).

The fact that there was no difference between the racial distribution of the Dayton school population as constituted at the time of suit and what that distribution would have been in the absence of any alleged constitutional violations by the Dayton Board is further demonstrated by two exceptions to the general pattern of racial distribution in the residential population served by the school district.

At the far western edge of the Dayton school district is located a residential area that has remained predominantly white for many years. Part of that area is within the school system and is served by Drexel Elementary School. Looking at the same statistical sources, we find that in the 1950-51 school year Drexel was 25.5% black in its student composition. The expansion of the black residential population of West Dayton in the next decade bypassed this area, and we find that from 1963 through 1973 the student composition of the school has remained remarkably stable at a black percentage ranging from 3.5% to 8.2% (*Ibid*).

Likewise, on the predominantly white East Side of Dayton, there has for many years been a small black residential area along Springfield Street (R. I. 1198-1199, Vol. 11). This area has been served by Washington Elementary School. Did the Dayton Board separate the black students living in this area from the white students living in surrounding areas? Or did the school in question – like the schools in predominantly white areas, in predominantly black areas and in changing

areas – simply mirror the composition of the student population served? The statistics again provide an irrefutable answer. In 1951 Washington had a 19% black student body. During the years from 1963 through 1973 the percentage varied from 14.5% to 23% – a natural variation reflecting the number of black and white school children living in the area (A. 275-276-Ex., 290-Ex.).

Even the witnesses called by the plaintiffs at the hearing which followed this Court's remand confirmed the basic and undeniable fact that arises from the evidence in this case – the racial composition of the Dayton school population is nothing more and nothing less than a reflection of residential patterns (A. 520-522, 527-528). Ironically, both of the black graduates of the Dayton school system who testified on behalf of the plaintiffs in the November 1977 hearings had attended predominantly white schools because they lived in geographic proximity to such schools (A. 522, 527).

It is in the factual context of these statistics and this testimony – not through a maze of judicially created presumptions – that a reviewing court must determine whether the District Judge's rulings on the issue of incremental segregative effect were clearly erroneous. The District Court found that constitutional violations by the Dayton Board had occurred in three historic areas – faculty assignment prior to 1951, the opening of the first Dunbar High School in 1933 and a series of isolated practices that occurred at varying times before 1954. In a carefully reasoned analysis of the evidence before it, the Court concluded that none of these violations had any effect on the racial distribution of the Dayton school population as presently constituted.

In 1951, the Dayton Board expressly replaced a practice of hiring black teachers only to teach in black schools with a policy of "dynamic gradualism" under which black teachers began to receive teaching assignments in white and mixed schools (A. 176-Ex., 187-Ex.). The new policy was implemented by the Board. All traces of faculty segregation were ultimately eliminated from the system. At the initiation of

this action – in fact, since 1969 – the teaching and administrative staff of the Dayton school system was substantially integrated (A. 153a, A. 226, A. 285-286-Ex.). In the absence of any "current condition" argument, the plaintiffs were relegated to the argument that the ghost of past assignment practices had identified schools as black or white. That argument was refuted both by statistical evidence and by the testimony of the very expert produced by the plaintiffs on the subject.

An examination of the evidence related to the staffing of schools during the period from 1947 through 1952 indicates that schools designated as "mixed schools" had black increases despite the fact that the teaching staffs remained unchanged (A. 212-216-Ex.). Of particular interest is the situation that occurred at the elementary schools of Weaver and Irving. In the 1947-48 school year, Weaver had a black population of 59.4% and at the end of the 1950-51 school term this population had increased to 69.9% (A. 212-Ex., 215-Ex.). Yet, for the 1951-52 school year, when four black teachers were added to the staff at Weaver, the black population decreased by 2.3% (A. 216-Ex.). Similarly, the black population at Irving jumped from 25.6% in 1947 to 46.6% in 1951, notwithstanding the fact that the staff remained all white. The only conclusion that can be drawn from this kind of evidence is that teaching assignments had nothing whatsoever to do with the changing racial compositions of the schools. *See Alexander* v. *Youngstown Board of Education*, 454 F. Supp. 985, 1072 (N.D. Ohio 1978).

Dr. Robert L. Green, called by the plaintiffs as a witness on the effect of faculty assignment practices, confirmed this conclusion when he answered "not at all" to the question whether assignment of black teachers to schools with the larger number of black students affected the perception of whether such schools were intended as black schools (A. 113). Regardless of what conclusion another trier of the facts might reach, there was abundant evidence to support the Trial

Court's conclusions on this subject, and they cannot be set aside as "clearly erroneous."[6]

As with the pre-1951 practices of faculty assignment, the opening of the first Dunbar High School in 1933 had no effect on the racial distribution of the Dayton school population as constituted at the time of suit. Dunbar was located on the West Side of Dayton, and had it been assigned a neighborhood attendance zone instead of a city-wide zone it would still have been an all-black high school thirty to forty years ago (*See* A. 306-307-Ex., A. 169-171a). Any effect of the city-wide attendance boundaries assigned to Dunbar during its existence from 1933 to 1962 was limited to the high school level. It is apparent from the distribution of the black residential population in Dayton during this period that the only high school conceivably affected was Roosevelt which was located in the pathway of the expanding black population of Dayton.

If the only incremental segregative effect of old Dunbar was the potential of drawing black high school students from the Roosevelt area to Dunbar, what trace of that effect remained in the system at the time suit was filed? In 1951 Roosevelt was 31.5% black (A. 216-Ex.). By 1963 it had become 94.5% black, and after 1967 it was virtually all black (A. 290-Ex.). It is thus apparent that any trace of the effects of old Dunbar had disappeared from the school system long before the institution of this litigation. The pattern of residential expansion from the center established at the time of the 1913 flood simply proceeded along its natural course. The reflection of the residential patterns which we have observed in the elementary schools is equally observable in the high schools. As the population moved northward from the Roosevelt area into the area of Colonel White High School, we find the black composition of the latter school changing from 8.4% in 1967 to 19.3% in 1968, 38.9% in 1969 and 42.1% in 1970 (*Ibid*). The Trial

[6] See footnote 3 *supra* at 33. *See* A. 84, 101, 108-112.

Court's conclusion that any segregative intent in the opening of old Dunbar in 1933 had no incremental segregative effect on the distribution of the Dayton school population at the time of suit was grounded in substantial evidence.[7]

The last category in which the Trial Court found historic instances of segregative intent without any present incremental segregative effect consists of a series of unrelated and isolated practices. Once the weight of the Sixth Circuit's erroneous presumptions is removed from the scales of justice, the Trial Court's findings in this category likewise satisfy any formulation of the appropriate standards of appellate review.

The only instance in the record of this case which can be considered the denial of access to any school in the Dayton system on account of race is the situation at Garfield school between 1910 and 1920 when black elementary children were taught in separate and inadequate facilities (A. 137-139). The weakness of the plaintiffs' case is perhaps best illustrated by its repeated emphasis on a situation which has existed only as a page from a book of local history for almost sixty years. Segregatory practices involving high school swimming pools in the 1930's and pre-1950 athletic programs have left no discernable traces on the present distribution of the Dayton school population. Likewise, the transportation of black orphans to a black elementary school for well-meaning but constitutionally misguided reasons before 1950 can hardly be considered as having an incremental segregative effect on the system at the time suit was filed where such orphans had been attending predominantly white elementary schools for more than twenty years before that date (A. 184-Ex.; R. I. 1236-1237, Vol. 12). Since no trace of any of these historic practices exists in the present school system, there is nothing

[7] The Trial Court's findings with respect to Dunbar High School together with supporting references to the record are found at A. 4a, and 169-171a.

for equity to remove in order to transform "what is" into "what would have been."[8]

With respect to the remaining claims asserted by the plaintiffs, the Trial Court found neither segregative intent nor incremental effect. The lengthy and well reasoned findings of fact entered by the Trial Court should require no further gloss. When viewed without the distorting lenses of the Sixth Circuit's erroneous legal presumptions, the evidence shows a situation where the present distribution of the Dayton school population has been dictated by residential patterns, not by Board actions. Since actions of the Dayton Board had no incremental effect on the racial imbalance of the school population produced by those patterns, it was entirely appropriate for the Trial Court to dismiss the plaintiffs' complaint.

C. THE SIXTH CIRCUIT'S ABANDONMENT OF THE REQUIREMENT OF PROVING STANDING AS A CONDITION PRECEDENT TO SECURING EQUITABLE RELIEF IS CONTRARY TO ESTABLISHED JUDICIAL PRECEDENT.

From the outset of this litigation and through the numerous appeals and remands that have marked its history in the courts, the defendants have maintained that the record is void of any evidence that any of the plaintiffs sustained any injury, that any of them was deprived of any constitutional right, that any of them is a member of the class they purportedly represent and that this action is properly maintainable as a class action. None of the plaintiffs ever testified at any of the hearings held below. None of the evidentiary exhibits establish that any of them was ever

[8] The Trial Court's findings with respect to various historic incidents determined to involve segregative intent together with supporting references to the record are found at A. 147-149a.

excluded from attending any school in the Dayton system. Not only did they fail to establish the minimal requirement of injury or deprivation of a constitutional right; they failed even to establish that any one of them was a school child or a parent of a school child or that any of them ever attended or sought to attend school in the Dayton system.

Proof of standing is an essential element in a case of this nature:

> "[t]he essence of the standing question, in its constitutional dimension 'is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' . . . The plaintiff must show that he himself is injured by the challenged action of the defendant." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 260-261 (1977).

This Court's remand of this action for the purpose of supplementing the record gave the plaintiffs an opportunity to fill the jurisdictional void if it lay within their power to do so. The opportunity was ignored.

Courts deal with particular rights of particular people. The plaintiffs cannot prevail on the merits in the absence of proof of a violation of their rights under the jurisdictional provisions which they have invoked. *Cf. Bell* v. *Hood*, 327 U.S. 678 (1946). Thus, the plaintiffs in this case had the burden of establishing that one of them, or at least some member of the N.A.A.C.P. was excluded from a school in the Dayton system on account of race. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971). In order to maintain this suit as a class action under Rule 23 of the Federal Rules of Civil Procedure, the plaintiffs were required to prove that they are members of the class they purportedly represent. *Bailey* v. *Patterson*, 369 U.S. 31 (1962). They were further required to obtain certification from the District Court that the suit is

maintainable as a class action. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976).

None of these requirements was met. While the District Judge was correct in dismissing the plaintiffs' complaint on the substantive grounds which formed the basis for his findings and conclusions, he did not have to reach those substantive issues. The complaint should have been dismissed on jurisdictional grounds. While desegregation cases raise significant social issues, the significance of those issues should not change basic concepts of standing and burden federal courts with the responsibility of rendering far-reaching decisions at the request of curious bystanders.

VIII. CONCLUSION

The conceptual crossroads where this Court and the Sixth Circuit have taken different paths is manifest from an analysis of the facts of this case and the reasoning of the opinion under review. The Sixth Circuit's approach — a theoretical exercise of presumptive reasoning — is guided by an underlying comparison between the distribution of the student population as it exists and an ideal diffusion of black and white students throughout the system. This Court's approach — a pragmatic analysis of factual evidence — demands actual proof of constitutional violations and of the conditions that would exist in the absence of such violations.

The lure of the Sixth Circuit's approach is a uniformity of result in all desegregation cases, northern or southern. If the ultimate measure is to be systemwide racial balance, any school system may be required to satisfy that measure either voluntarily or pursuant to a federal court order. While such a result may satisfy an ideologic desire, it goes far beyond the dictates of the Constitution and the concepts of equity. Conduct unmotivated by segregative intent does not violate the Constitution. Where such intent has existed the Constitution is satisfied by elimination of its effects. The constitutional duty is not a duty to balance or diffuse the races; it is rather

a duty to treat all races in the same manner and to deny no right for racial reasons.

The path taken by the Sixth Circuit is a maze of tangled presumptions and procedural snares. It should be closed, and cases of this nature should be directed along the path already established by prior decisions of this Court. When the appropriate guideposts for determining segregative intent and incremental segregative effect are applied to the evidence in this case, the conclusion is compelled that the plaintiffs have failed to establish a right to relief. The Trial Court was correct in dismissing their complaint and its order should be reinstated by this Court.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 22 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTORBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

vs.

MARK BRINKMAN, et al.,
Respondents.

BRIEF OF RESPONDENTS OHIO STATE BOARD OF EDUCATION AND STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTORBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

v.

MARK BRINKMAN, et al.,
Respondents.

BRIEF OF RESPONDENTS OHIO STATE BOARD OF EDUCATION AND STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 583 F.2d 243 (6th Cir. 1978), and is found in the appendix to the Petition for a Writ of Certiorari in this action, at 189a. The opinion of the United States District Court for the Southern District of Ohio is reported at 446 F. Supp. 1232 (S.D. Ohio 1977), and appears in the appendix to the Petition for a Writ of Certiorari in this action at 142a.

This case (No. 78-627) is set for oral argument in tandem with No. 78-610, *Columbus Board of Education* v. *Penick*. The opinion of the United States Court of Appeals for the Sixth Circuit in that case is reported at 583

F.2d 787 (6th Cir. 1978). The opinion of the United States District Court for the Southern District of Ohio in that case is reported at 429 F. Supp. 229 (S.D. Ohio 1977).

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

III. STATEMENT OF THE CASE

The history of this litigation during the period from its inception on April 17, 1972 until the decision rendered by this Court on June 27, 1977 is set forth in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 97 S.Ct. 2766 (1977) (*Dayton*). On remand, pursuant to this Court's directive, the District Court conducted evidentiary hearings which commenced on November 1, 1977. Considering all of the evidence presented at the various trials and hearings of this action in the light of the principles established by this Court, the District Court concluded that the plaintiffs had failed to establish a right to relief. On December 15, 1977 it accordingly entered an order dismissing the plaintiff's complaint.

The District Court based its order on a detailed series of findings of fact and conclusions of law. In considering historical isolated incidents of constitutional violations it found that there was no proof of any incremental segregative effect from such actions. Existing racial imbalance was not found to be a result of any intentional segregative act or acts on the part of the Dayton Board, but rather the simple reflection of residential living patterns in the geographic area served by the school system.

Faculty assignment and hiring practices were reviewed. While such practices involved purposeful separation of teachers by race until 1951, all vestiges of these earlier practices had disappeared by 1969 — some three years before this litigation was instituted. Moreover, these earlier practices were specifically found not to have had any incremental segregative effect. The Trial Court, on the basis of the evidence, found that racial identifiability of schools was determined by their student composition and not by faculty assignment.

Attendance zones were held not to have been created with any discriminatory intent. Transfer policies were found to be non-discriminatory with the exception of a practice of transfers involving Shawen Acres Orphanage students — a practice which ceased in the early 1950's and which was held not to have had any incremental segregative effect. Site selection, construction, uses of portables and school utilization practices were found not to have involved any intent to discriminate and not to have had any incremental segregative effect.

Although Dunbar High School was established as a voluntary black school in 1933, the census data established that Dunbar would have been all black by 1960 even if it had not been a school for voluntary attendance. Establishment of the old Dunbar High School was accordingly held not to have had any incremental effect on the situation existing in the school system when suit was filed in 1972. The Trial Court further found that there was no segregative intent with respect to the creation of the new Dunbar High School.

The one adverse finding made in the previous decision of the District Court — the maintenance of optional attendance zones between contiguous schools throughout the district — was reexamined in the light of additional evi-

dence presented at the hearings following the remand. The evidence demonstrated neither segregative intent nor segregative effect in the establishment and maintenance of optional zones.

As was confessed by one of the experts called by the plaintiffs at the post-remand hearings, the Dayton Board had really done nothing to separate the races for at least two decades before this case came to trial. As an official of the plaintiff NAACP admitted, the worst thing that can be said in retrospect about the Dayton schools is that they reflect the racial imbalance of the geographic neighborhoods they serve.

After the dismissal of their complaint, the plaintiffs filed a notice of appeal to the Sixth Circuit Court of Appeals. On January 16, 1978 the Sixth Circuit issued a stay order holding in effect pending appeal the systematic racial balance plan which had been imposed prior to this Court's decision in *Dayton*. On June 27, 1978 the Sixth Circuit reversed the District Court's dismissal of the case, and it entered a final order reinstating the systematic racial balance plan. Applications for a stay were denied, and students in the Dayton system are still being transported to distant school buildings under a plan that cannot stand under the facts presented and the constitutional principles applicable to those facts.

IV. ARGUMENT

The Sixth Circuit In This Case Misapplied This Court's 1977 Decision In Dayton Board of Education v. Brinkman By Improperly Putting The Burden Of Proof On Petitioners, And By Emasculating The Incremental Segregative Effect Analysis Mandated By This Court.

This Brief is directed to the following two issues:

(1) Whether the Sixth Circuit erred in holding that the District Court improperly examined individually each alleged constitutional violation to determine its incremental segregative effect, contrary to *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977).

(2) Whether the Sixth Circuit erred in holding that the District Court improperly placed upon Plaintiffs-Respondents the burden of proof on the issue of incremental segregative effect, contrary to *Dayton Board of Education* v. *Brinkman, supra*; *Washington* v. *Davis*, 426 U.S. 229 (1976); and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). This Brief shows that each of these questions should be answered in the affirmative. The Sixth Circuit committed each of these errors, and in so doing unjustifiably extended and misconstrued the burden shifting principle of *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

It is important to remember the posture in which this case comes before this Court. This Court is not faced with a dual school system. In its 1973 Findings of Fact, the District Court found that the attendance zones, school site selection and construction actions, and the freedom of enrollment system of the Petitioner Dayton Board were not segregative in either their purpose or their effects.

February 7, 1973 Findings of Fact and Memorandum Opinion of Law, pp. 5-8 and 9-10, reproduced as an appendix to the District Court's 1977 opinion, 446 F. Supp. 1254, 1256-1258. In its Findings of Fact and Conclusions of Law filed December 15, 1977, reported at 446 F. Supp. 1232 (S.D. Ohio 1977) (p. 142a of the appendix in the Petition for a Writ of Certiorari in this action), the District Court held that "acts of intentional segregation by the Dayton Board of Education ended over twenty years ago," 446 F. Supp. at 1253 (186a). The court further held that:

> "Evidence of segregative intent and incremental segregative effect has not been supplied. Accordingly, the Court must find that plaintiffs have failed to meet their burden of proof as now imposed by the Supreme Court of the United States." 446 F. Supp. at 1253 (186a).

Dayton Board of Education v. *Brinkman,* 443 U.S. 406, 420 (1977), stated that this case is one "where mandatory segregation by law of the races in the schools has long since ceased," and that the facts are "that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution." 433 U.S. at 417. The Sixth Circuit in this case did not disagree, *Brinkman* v. *Gilligan,* 583 F.2d 243, 249 (6th Cir. 1978) (197a): "We recognize that racial imbalance in student attendance patterns is not in itself a constitutional violation."

The position of the Ohio State Board of Education and State Superintendent of Public Instruction, hereinafter "state respondents," in the instant case is different from that in the Columbus case, *Columbus Board of Education* v. *Penick,* No. 78-610. In the instant case the District Court dismissed the action, 446 F. Supp. at 1253 (188a),

without having made any findings of liability against the state defendants. In contrast, these same state defendants in the Columbus case were found by the District Court to be liable for unconstitutional segregation of the Columbus school system, *Penick* v. *Columbus Board of Education,* 429 F. Supp. 229, 262-263 (S.D. Ohio 1977), affirmed except as to liability of state defendants, which was remanded, 583 F.2d 787, 815-818 (6th Cir. 1978).

Since the liability of the state respondents is yet to be finally determined, state respondents have a vital interest in the proper resolution of the incremental segregative effect and burden of proof issues which this Brief addresses.

1. The Sixth Circuit Erred In Holding That The District Judge Erroneously Examined Each Individual Alleged Violation To Determine Its Incremental Segregative Effect.

The Sixth Circuit in this case held that the District Court erroneously applied the incremental segregative effect analysis required by this Court's decision in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 420 (1977). The Sixth Circuit stated, 583 F.2d at 257-258:

> "The district court committed two errors in its approach to this inquiry. First, it individually examined each alleged constitutional violation as if it were an isolated occurrence and sought to determine the incremental segregative effect of that occurrence.
>
> * * *
>
> Secondly, the district court erred in allocating the burden of proof on the issue of incremental segregative effect to plaintiffs, requiring them to establish both racial discrimination and the specific incremental effect of that discrimination. Where plaintiffs prove,

> as here, a systemwide pattern of intentionally segregative actions by defendants, it is the defendants' burden to overcome the presumption that the current racial composition of the school population reflects the systemwide impact of those violations. *See Keyes, supra,* 413 U.S. at 211 n. 17, 93 S.Ct. 2686. Nowhere in the record have defendants rebutted this presumption." (Emphasis in original.)

This section of this Brief shows that the Sixth Circuit was wrong when it stated that the District Court erred in individually examining each alleged constitutional violation to "determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted," *Dayton Board of Education* v. *Brinkman,* 433 U.S. at 420.

It is important to keep in mind that this Court's opinion in *Dayton Board of Education* v. *Brinkman, supra,* dealt with the remedial stage of a desegregation action. 433 U.S. at 408, 414-415. Subsequent opinions have recognized that this Court's opinion in *Dayton Board of Education* v. *Brinkman* dealt primarily with the remedial phase of school desegregation cases. *Brennan* v. *Armstrong,* 433 U.S. 672, 674 n.4 (1977) (vacating and remanding Milwaukee, Wisconsin school desegregation action which had been appealed as to liability, before remedial desegregation plan was formulated, and stating that *Dayton Board of Education* v. *Brinkman* "is primarily a remedy case and therefore irrelevant to the action of the Court of Appeals in this case."); *United States* v. *School District of Omaha,* 565 F.2d 127, 128 (8th Cir. 1977).

This Court in *Dayton Board of Education* v. *Brinkman* recognized that a step by step analysis is required in a desegregation case, and that the first stage of the analysis is the effort to determine whether constitutional violations are

present. See *Hills* v. *Gautreaux,* 425 U.S. 284, 293 (1976), holding that the federal courts' remedial powers may be exercised only on the basis of a constitutional violation; *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 434 (1976). Once these violations are shown, the second or remedial stage of the process must take place, and that remedial stage involves several steps. The Sixth Circuit has confused the steps applicable to the two stages, and held that the *Keyes* principle of a shifting burden of proof is applicable to the remedial stage of the case.

This Court's opinion in *Keyes* dealt with the first stage of a desegregation case, *i.e.,* the stage in which it is determined whether or not a constitutional violation has been committed. It was in the context of proving whether a constitutional violation was shown that this Court held that a finding of intentionally segregative school board actions in a meaningful portion of a school system creates a presumption that other segregative schooling in the system is not adventitious, and shifts to the school authorities the burden of proving that other segregative schools in the system are not the result of intentionally segregative actions. 413 U.S. at 208.

Dayton Board of Education v. *Brinkman* held that "federal courts have authority to grant appropriate relief of this sort [restructuring the administration of a local school system] *when constitutional violations* on the part of school officials *are proved.*" 433 U.S. at 410, citing *Keyes, supra* (emphasis added). *Keyes* formulated the burden of proof principles to be used by the District Courts in first determining whether a violation exists.

Dayton Board of Education v. *Brinkman* recognized that the District Court must first make findings of fact and conclusions of law as to the existence of constitutional violations, and must then fashion a remedy. The court's use

of the word "must" indicates that this procedure is mandatory.

> "The District Court, in the first instance, subject to review by the Court of Appeals, *must* make new findings and conclusions as to violations in the light of this opinion, Washington v. Davis, 426 US 229, 48 L Ed 2d 597, 96 S Ct 2040 (1976), and Arlington Heights v. Metropolitan Housing Dev. Corp., 429 US 252, 56 L Ed 2d 450, 97 S Ct 555 (1977). It *must* then fashion a remedy in the light of the rule laid down in Swann, and elaborated upon in Hills v. Gautreaux, 425 US 284, 47 L Ed 2d 792, 96 S Ct 1538 (1976)." 433 U.S. at 419 (emphasis added).

Immediately after the above-quoted passage from *Dayton Board of Education* v. *Brinkman,* this Court recognized that the District Court must follow two steps in order to determine the nature and scope of the constitutional violations. Again this Court used mandatory language, 433 U.S. at 420:

> "The *duty* of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to *first* determine whether there was any action in the conduct of the business of the school board which *was intended to,* and *did in fact, discriminate* against minority pupils, teachers, or staff. Washington v. Davis, supra. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found the District Court in the first instance, subject to review by the Court of Appeals, *must* determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." (Emphasis added.)

The incremental segregative effect analysis is used to determine the nature and extent of the constitutional violation which the remedy must redress. Numerous cases from this Court have held that a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation. These cases are collected in *Hills* v. *Gautreaux,* 425 U.S. 284, 293-294 (1976); *Dayton Board of Education* v. *Brinkman,* 433 U.S. at 420; *Milliken* v. *Bradley,* 433 U.S. 267, 280 (1977); and *Regents of the University of California* v. *Bakke,* — U.S. —, 57 L.Ed.2d 705, 778 (1978).

In the instant case the District Court scrupulously followed the incremental segregative effect analysis. Indeed, most of its December 15, 1977 Findings of Fact and Conclusions of Law (446 F. Supp. 1232 (S.D. Ohio 1977)) is devoted to an examination of the incremental segregative effect analysis. After a detailed review of the testimony and other evidence, the District Court concluded, 446 F. Supp. at 1253 (186a) that:

> "Evidence of segregative intent and incremental segregative effect has not been supplied. Accordingly, the Court must find that plaintiffs have failed to meet their burden of proof as now imposed by the Supreme Court of the United States."

The Sixth Circuit held that this conclusion was erroneous because the District Court "individually examined each alleged constitutional violation as if it were an isolated occurrence and sought to determine the incremental segregative effect of that occurrence." *Brinkman* v. *Gilligan,* 583 F.2d 243, 257 (6th Cir. 1978). The District Court did individually examine each alleged constitutional violation, as is required by this Court's opinion in *Dayton Board of Education* v. *Brinkman.* The only way that any District Court can determine the sum total of the incremental seg-

regative effects of alleged violations is to determine how much incremental segregative effect each alleged violation had. Yet the Sixth Circuit held that the phrase "incremental segregative effect" has a different meaning, 583 F.2d at 257: "The impact is 'incremental' in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution." The Sixth Circuit erred in holding that "incremental" referred to the time span over which the impact of school board action is manifested. This is shown by the following passage from *Dayton Board of Education* v. *Brinkman*, 433 U.S. at 420:

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, *when that distribution is compared to what it would have been in the absence of such constitutional violations*. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." (Emphasis added.)

The emphasized language in this quotation shows that the incremental segregative effect analysis is concerned not with the period of time over which the impact is felt, but rather with the amount or quantity of segregative inpact that constitutional violations had on the racial distribution of student population. In other words, the Sixth Circuit is wrong in saying that the impact is incremental in that it occurred gradually over the years instead of all at once. The impact is incremental in that it is the amount of segregative effect or impact which would not have existed but for the constitutional violations. The increment being measured is not temporal but quantitative.

The Sixth Circuit opinion in this case, 583 F.2d at 257-258, and the Sixth Circuit opinion in the Columbus case (No. 78-610 in this Court) *Penick* v. *Columbus Board of Education*, 583 F.2d 787, 813-814 (6th Cir. 1978), contain an internal inconsistency in their reasoning about the incremental segregative effect analysis. This inconsistency is shown by the opinion in *Penick*, 583 F.2d at 813-814, which is quoted in *Brinkman* v. *Gilligan*, 583 F.2d at 257-258.

The court began by correctly stating that the incremental segregative effect analysis requires individual examination of each separate episode or practice which is alleged to constitute a violation:

> "It is clear to us that the phrase 'incremental segregative effect' and 'systemwide impact' employed in the *Dayton* case require that the question of systemwide impact *be determined by judging segregative intent and impact as to each isolated practice, or episode.* Each such practice or episode inevitably adds its own 'increment' to the totality of the impact of segregation." 583 F.2d at 813-814 (emphasis added).

That is precisely what the District Judge did in the instant case. 446 F. Supp. at 1236, 1239, 1241, 1243, 1245, 1246, 1248, 1250, 1253.

The Sixth Circuit incorrectly went on to conclude that each segregative practice or episode should not be judged upon its separate impact on the school system:

> "*Dayton* does not, however, require each of fifty segregative practices or episodes to be judged solely upon *its* separate impact on the system. The question posed concerns the impact of the total amount of segregation found — after each separate practice or episode has added its 'increment' to the whole. It was not just the last wave which breached the dike and caused the flood." 583 F.2d at 814, quoted in *Brinkman* v. *Gilligan*, 583 F.2d at 257-258 (emphasis in original).

The Sixth Circuit here confused the determination of incremental segregative effect with the determination of whether the segregative practices or episodes have a systemwide impact. Only after the District Court examines the incremental segregative effect of the alleged unconstitutional practices can it determine whether there has been a systemwide impact. Again, the key passage from this Court's opinion in *Dayton Board of Education* v. *Brinkman* is 433 U.S. at 420, quoted *supra*:

> "The remedy must be designed to redress *that difference,* and only if there has been a systemwide impact may there be a systemwide remedy." (Emphasis added.)

The phrase "that difference" refers to the difference between "how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." 433 U.S. at 420.

Thus the internal inconsistency in the Sixth Circuit opinions is this. The court began by stating that it is proper to judge segregative intent and impact as to each isolated practice or episode. The court then reversed itself and said that the question was the impact of the total amount of segregation found after each separate practice or episode added its increment to the whole amount of segregation. This circular and confusing analysis only paid lip service to this Court's requirement of analysis of incremental segregative effect. By requiring the District Court to do no more than determine "the impact of the total amount of segregation found after each separate practice or episode has added its 'increment' to the whole." 583 F.2d at 814, the Sixth Circuit has formulated a different test for the District Courts in the Sixth Circuit

to apply. The District Courts in the Sixth Circuit are now encouraged to look to "the impact of the total amount of segregation found," and may slide by the comparison of the effect of these violations on the racial distribution of the school population "when that distribution is compared to what it would have been in the absence of such constitutional violations." *Dayton Board of Education* v. *Brinkman,* 433 U.S. at 420.

The effect of this Sixth Circuit analysis is to resurrect the "cumulative violation" analysis condemned in *Dayton Board of Education* v. *Brinkman,* 433 U.S. at 413-416, 419, which permits a number of practices together to be a sufficient basis for a finding of a constitutional violation. The effect of the above-described internal inconsistency in the Sixth Circuit's opinions is to dilute or emasculate the required analysis of incremental segregative effect.

The two cases before this Court (the Columbus case, No. 78-610, and the instant case, No. 78-627) are not the only instances in which the Sixth Circuit has ignored this Court's requirement of an incremental segregative effect analysis. In *N.A.A.C.P.* v. *Lansing Board of Education,* 581 F.2d 115 (6th Cir. 1978), the Sixth Circuit affirmed a district court's remedial order for the Lansing, Michigan elementary schools even though the Sixth Circuit explicitly recognized that "the district court did not specifically make findings on the 'incremental segregative effect' of these violations," 581 F.2d at 115. Yet this Court's opinion in *Dayton Board of Education* v. *Brinkman* held that such findings were mandatory, stating that "the District Court in the first instance, subject to review by the Court of Appeals, *must determine* how much incremental segregative effect these violations had on the racial distribution," 433 U.S. at 420 (emphasis added).

2. The Sixth Circuit Erred As A Matter Of Law In Placing The Burden Of Proof Upon Defendants-Petitioners.

The Sixth Circuit repeatedly held that the burden of proof in the trial court in this case was upon the Petitioner Dayton Board of Education. *Brinkman* v. *Gilligan,* 583 F.2d 243, 251-252, 255, and 258 (6th Cir. 1978). In so doing, the Sixth Circuit made an unwarranted extension of the burden shifting principles of *Keyes* v. *School District No. 1,* 413 U.S. 189, 208-211 (1973), and violated the principles of *Washington* v. *Davis,* 426 U.S. 229 (1976), *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977), and *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 413 (1977). Much confusion now exists in this area of the effect of the latter three cases on earlier desegregation opinions. The Sixth Circuit in the instant case ignored the holdings of both *Washington* v. *Davis* and *Arlington Heights* as to a plaintiff's burden of proving purposeful or intentional segregative actions and reversed the order of the District Court which had applied the holdings of those two cases. *Brinkman* v. *Gilligan,* 446 F. Supp. at 1235-1236, and 1253.

It is especially difficult to reconcile *Washington* v. *Davis, Arlington Heights,* and *Dayton Board of Education* v. *Brinkman* with the earlier *Keyes* holding that under certain circumstances the burden of proof in these desegregation cases can shift to defending school authorities. This Court's clarification of this burden shifting rule is needed now.

A. Keyes Should Be Held To Shift Only The Burden Of Going Forward With Evidence, Not The Burden Of Persuasion.

This issue is one of first impression for this Court in desegregation cases. The opinions in this Court and in the lower courts have not distinguished between the two meanings of the burden of proof (*i.e.,* the burden of going forward with evidence, and the burden of persuasion) in stating that proof of intentional segregation in a meaningful part of a school district shifts to the defendant school authorities the burden of showing that other segregated schools are not also the product of intentionally segregative actions. To avoid placing an impossible burden on defending school authorities, this Court should now expressly hold that under *Keyes,* only the burden of going forward with evidence can ever shift to defendant school boards.

The burden shifting holding of *Keyes* is that once a plaintiff proves purposeful or intentional segregation in a meaningful portion of a school system, the burden shifts to the defendant school authorities to prove that other segregated schools in the system are not also the result of intentionally segregative actions. 413 U.S. at 208:

> "Applying these principles in the special context of school desegregation case, we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, *creates a presumption that other segregated schooling* within the system *is not adventitious.* It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and *shifts* to those authorities *the burden of proving that other segregated schools* within the system *are not also the result of intentionally segregative actions.*" (Emphasis added.)

The burden of proof issue in this case is critical because the outcome of the case may turn upon the allocation of the burden of proof;[1] the practical effect of the placement of the burden of proof upon defendants in a school desegregation action in the manner done by the Sixth Circuit in this case is to place an almost insurmountable hurdle before defendant state and local school boards. These boards of education must either disprove segregative intent (and the only practicable means of so doing is subjective proof, *i.e.*, denials of that intent by board members), or prove that a board's past actions did not contribute to present segregative conditions. This is the holding of *Keyes, supra,* 413 U.S. at 211:

> "Thus, if respondent School Board cannot *disprove segregative intent,* it can rebut the prima facie case *only* by showing that its past segregative acts did not create *or contribute* to the current segregative condition of the core city schools." (Emphasis added.)

Arlington Heights, supra, used language similar to the "contribute" language of the opinion in *Keyes*. *Arlington Heights* said judicial deference to challenged legislative action is not justified when "there is a proof that a discriminatory purpose has been a motivating factor in the decision," 429 U.S. at 265-266. See also 429 U.S. at 270: "Respondents [plaintiffs] simply failed to carry *their burden* of proving that discriminatory purpose was a *motivating* factor in the Village's [defendant's] decision." (Emphasis added.)

Hence the burden shifting principles of *Keyes* are unique

[1] *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976): "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application."

and have a very harsh effect.[2] There is language in the *Keyes* majority opinion indicating that the burden that is shifted under the *Keyes* rule is not simply the burden of going forward with evidence, but rather is the burden of persuasion (*i.e.*, the risk of n ersuasion), 413 U.S. at 210:

> "Their burden is to adduce proof sufficient to *support a finding* that segregative intent was not among the factors that motivated their actions." (Emphasis added.)

Other language in the *Keyes* majority opinion is of the type used by courts to describe the shifting of the burden of going forward with evidence. 413 U.S. at 209:

> "In that circumstance, it is both fair and reasonable to require that the school authorities bear the *burden of showing that their actions* as to other segragative schools within the system were not also motivated by segregative intent.
>
> * * *
>
> In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which 'fairness' and 'policy' require state authorities to *bear the burden of explaining actions or conditions* which appear to be racially motivated." (Emphasis added.)

See also the opinion of Mr. Justice Powell, concurring in part and dissenting in part, 413 U.S. at 228: "The burden then must fall on the school board to demonstrate it is

[2] *Keyes* also appears to say that the school board has the burden of justifying its conduct by clear and convincing evidence, rather than by a mere preponderance, 413 U.S. at 209. *Accord: United States* v. *Chesterfield County School District,* 484 F.2d 70, 73 (4th Cir. 1973); *Walston* v. *County School Board of Nansemond County, Va.,* 492 F.2d 919, 924 (4th Cir. 1974); *Reynolds* v. *Abbeville County School District,* 554 F.2d 638, 642 (4th Cir. 1977).

operating an 'integrated school system.' " This Court should clarify this ambiguity in *Keyes,* and hold that, as in the usual federal civil case, the burden that is shifted under the *Keyes* rule is the burden of going forward with evidence.

The distinction between the two meanings of the phrase "burden of proof" was best explained in James, Burdens of Proof, 47 Va. L. Rev. 51 (1961):

> "The term 'burden of proof' is used in our law to refer to two separate and quite different concepts. The distinction was not clearly perceived until it was pointed out by James Bradley Thayer in 1898. The decisions before that time and many later ones are hopelessly confused in reasoning about the problem. The two distinct concepts may be referred to as (1) the risk of non-persuasion, or the burden of persuasion or simply persuasion burden; (2) the duty of producing evidence, the burden of going forward with the evidence, or simply the production burden or the burden of evidence." (Footnotes omitted.)

The language used by the Sixth Circuit in this case appears to mean that the Sixth Circuit placed on Defendants-Petitioners not only the burden of going forward with evidence but also the burden of persuasion. This holding is erroneous. Even if the burden of proof was properly placed on Defendants-Petitioners, it was only the burden of going forward with evidence that should shift to defending school authorities under *Keyes.*

The Sixth Circuit here referred to the burden of proof that it held should have been put upon Defendants-Petitioners as the burden " 'to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions.' " *Brinkman* v. *Gilligan,* 583 F.2d at 254, quoting *Keyes,* 413 U.S. at 210.

To shift not only the burden of going forward with evidence but also the burden of persuasion is contrary to the ordinary rules of evidence in the federal courts. Federal Rule of Evidence 301 governs presumptions in federal courts and provides that the burden of going forward with evidence is shifted, and the burden of persuasion (risk of nonpersuasion) is not shifted. Federal Rule of Evidence 301 reads in full:

> "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but *does not shift to such party the burden of proof in the sense of the risk of nonpersuasion,* which remains throughout the trial upon the party on whom it was originally cast." (Emphasis added.)

In accordance with the plain language of this rule, the courts have held that the burden of going forward with evidence is shifted and the burden of persuasion is not shifted under that rule. *Usury* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 27 (1976); *Legille* v. *Dann,* 544 F.2d 1, 6-7 n.37 (D.C. 1976); *N.L.R.B.* v. *Heyman,* 541 F.2d 796, 801 n.10 (9th Cir. 1976).

The burden shifting rule of *Keyes* is unique in that *Keyes* is the only case uncovered by counsel for the state respondents in which the burden has been held to shift based upon constitutional requirements. "Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine* v. *Milne,* 424 U.S. 577, 585 (1976). In civil cases presumptions have usually been upheld when they do not shift the burden of persuasion. *Lavine* v. *Milne* upheld a New York statutory presumption

that a person was disqualified from receiving welfare benefits for seventy-five days if that person voluntarily terminated employment to qualify for welfare benefits. This Court stated, 424 U.S. at 584: "The provision carrys with it no procedural consequence; it shifts to the applicant neither the burden of going forward nor the burden of proof, for he appears to carry the burden from the outset." See also 424 U.S. at 585 n.9. In contrast, the *Keyes* language quoted above means that at least the burden of going forward with evidence shifts, and is susceptible to the interpretation that the burden of persuasion also shifts to the defending school authorities in desegregation actions.

The burden shifting rule that is most analogous to that of *Keyes* is found in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). These case held that Title VII of the Civil Rights Act of 1964 forbids the use of employment tests that are discriminatory in effect unless the defendant employer carries the burden of showing that a given requirement has a manifest relationship to the employment in question. "This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination," *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 425. Just as in *Keyes*, a minority plaintiff must make out a prima facie case of discrimination, and then the burden shifts to the defendant. The question then is, of course, what burden shifts to defendant?

The cases have held that it is the burden of going forward with evidence, and not the burden of persuasion, which shifts to defendants in these Title VII cases. This is made plain by the discussion in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973), which describes the sequence of proof after a prima facie case is

proved. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802. Once such a reason is articulated by the defendant employer, the plaintiff employee must then "be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext." 411 U.S. at 804. Hence the burden of persuasion is not upon the defending employer; once the defending employer carries his burden of going forward with evidence, the plaintiff employee must carry his burden of persuasion. *Accord*: *Chalk* v. *Secretary of Labor*, 565 F.2d 764, 766 (D.C. Cir. 1977), *cert. denied*, 98 S.Ct. 1527 (1978).

Two subsequent opinions in cases before this Court show that the burden that shifts in a Title VII action is the burden of going forward with evidence. *Furnco Construction Corp.* v. *Waters*, — U.S. —, 57 L.Ed.2d 957, 968-969 (1978), rejected the view that the *McDonnell Douglas* prima facie showing is "the equivalent of an ultimate finding by the trier of fact that the original rejection of the applicant was racially motivated," and held, 57 L.Ed. 2d at 969:

> "A McDonnell Douglas prima facie showing is not the equivalent of a factual finding of discrimination, however. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not those actions were bottomed on impermissible considerations."

See also *Nashville Gas Co.* v. *Satty*, — U.S. —, 54 L.Ed. 2d 356, 368 (1977) (Powell, J. concurring in the result and concurring in part), citing *Albemarle Paper Co.* v. *Moody* and *McDonnell Douglas Corp.* v. *Green, supra*, and

stating: "the issue is not simply one of burden of proof, which properly rests with the Title VII plaintiff."

Several lower court cases have expressly stated that the burden of proof that is shifted in a Title VII action is the burden of going forward with evidence, and not the burden of persuasion. *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 420 n.6 (5th Cir. 1975), analyzed the *McDonnell Douglas* burden shifting rule, and concluded: "Upon rebuttal evidence being offered, the ultimate burden of persuasion by a preponderance of the evidence that discrimination had taken place fell upon appellant's [plaintiff's] shoulders." *Hester* v. *Southern Railway Co.*, 497 F.2d 1374, 1381 (5th Cir. 1974, held:

> "Title VII comes into play only when such practices result in discrimination. At that point, *the burden of producing evidence shifts* to the employer, who must offer satisfactory justification for his procedures." (Emphasis added.)

Accord: *United States* v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582, 586 (4th Cir. 1972), *cert. denied sub nom. Locals 268 & 1130 of the Brotherhood of Railroad Trainmen* v. *United States*, 411 U.S. 939 (1973), in which the Fourth Circuit stated that "the *burden* shifted to the C&O *to come forward with evidence* to show that it had never discriminated in hiring black brakemen," (emphasis added); *James* v. *Stockham Valves and Fittings Co.*, 394 F. Supp. 434, 492-493 (N.D. Ala. 1975). The court expressly held in one of its conclusions of law that the risk of nonpersuasion never shifts:

> "8. The defendant may overcome the prima facie case by producing credible, contradictory evidence, but is not required to produce a preponderance of such evidence. *The risk of nonpersuasion remains at all times on the plaintiffs.*" (Emphasis added; citation omitted.)

The court held that once the defendant carried its burden, the burden of going forward with evidence shifts back to the plaintiff, 394 F. Supp. at 493:

> "12. Once a defendant has adequately rebutted any inferences raised, the burden shifts back to a plaintiff to come forward with further specific evidence of the discriminatory impact of the challenged practices."

Accord: *Commonwealth of Pennsylvania* v. *Glickman*, 370 F. Supp. 724, 731 (W.D. Pa. 1974).

In civil cases this Court has struck down certain presumptions which do not give adequate opportunity for rebuttal. *Vlandis* v. *Kline*, 412 U.S. 441, 453 (1973), held that a permanent irrebuttable presumption of nonresidence contained in a Connecticut statute violated the Due Process Clause because it provided no opportunity for college students who applied for admission from out of state to demonstrate that they had become bona fide Connecticut residents. See also *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 644-645 (1974); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); Note, The Irrebuttable Presumption Doctrine In The Supreme Court, 87 Harv. L. Rev. 1534, 1544-45 (1974). *"And when the presumed fact itself determines whether* a benefit is awarded or a *burden is imposed, then the legal outcome itself depends upon proof of the basic fact."* 87 Harv. L. Rev. at 1545 (emphasis added). Under the Sixth Circuit's interpretation of *Keyes*, the presumed fact of racially segregated schooling (the "presumption that other segregated schooling within the system is not adventitious," *Keyes*, 413 U.S. at 208) itself determines whether the burden of proof is imposed on defending school authorities. The presumption "shifts to those authorities the burden of proving that other segregated schools within the system are not also

the result of intentionally segregative actions." *Keyes*, 413 U.S. at 208. Thus the legal outcome itself depends upon proof of the basic fact. See footnote 1, *supra*.

Whatever the outcome of the evolving irrebutable presumption doctrine, the lesson of those cases for the purpose of this case is that policy considerations of fundamental fairness require the courts to examine closely the practical effect of placement of the burden of proof. *Accord*: *Keyes*, 413 U.S. at 209. The result of that close examination in this case should be the holding that only the burden of going forward with evidence, and not the burden of persuasion, can ever shift to defending school authorities.

The effect of shifting the burden of persuasion to school desegration defendants would be that the presumption of the defendants' responsibility would be almost impossible to rebut? Why? As long as the contributing cause or motivating factor standard is the law (see pp. 22-23, *supra*), defendant school authorities would then have to carry not only the burden of going forward with evidence but also the burden of persuasion that all their myriad actions did not contribute to present segregated conditions, or were not in some infinitesimal part motivated by discriminatory purpose. *Keyes*, 413 U.S. at 211; *Arlington Heights, supra*, 429 U.S. at 265-266, 270. Since the motivations of public bodies are varied and legislative and administrative actions are multipurposed, *Arlington Heights, supra*, 429 U.S. at 265, the placement of the burden of persuasion upon school authority defendants makes that burden, in practical terms, an impossible one. This Court should clarify *Keyes* and hold that only the burden of going forward with evidence is shifted.

B. The Sixth Circuit Erred In Placing On Defendants-Petitioners The Burden Of Proof On Intent And On Incremental Segregative Effect.

The District Court in this case held that "There is a burden upon plaintiffs to establish by a preponderance of evidence *both a segregative intent and an incremental segregative effect in order to establish a violation* of the Equal Protection Clause of the Fourteenth Amendment." *Brinkman* v. *Gilligan*, 446 F. Supp. 1232, 1253 (S.D. Ohio 1977), quoted by the Sixth Circuit, 583 F.2d at 246 (emphasis added by the Sixth Circuit). The Sixth Circuit held that this was a "misunderstanding of the Supreme Court's mandate," 583 F.2d at 246 (footnote omitted). The Sixth Circuit was wrong. It was not a misunderstanding of this Court's mandate in *Dayton Board of Education* v. *Brinkman*. It was a correct statement of the law by the District Court.

The District Court correctly applied, and the Sixth Circuit erroneously ignored, this Court's holdings in *Washington* v. *Davis, Arlington Heights,* and *Hills* v. *Gautreaux, supra,* when it held that it is the plaintiff's burden to establish by a preponderance of the evidence a segregative intent. The District Court properly held that it was also plaintiff's burden to establish incremental segregative effect. 446 F. Supp. at 1253. The Sixth Circuit erred in holding that the burden shifting principles of *Keyes* applied to the incremental segregative effect analysis as well as to the segregative intent analysis. 583 F.2d at 258.

Washington v. *Davis, Arlington Heights,* and *Dayton Board of Education* v. *Brinkman, supra,* were decided after *Keyes*. These cases reaffirmed the principle that there can be no violation of the Equal Protection Clause of the

Fourteenth Amendment without proof of purposeful or intentional discrimination. *Keyes* itself recognized the indispensable element of purpose or intent to segregate, 413 U.S. at 208:

> "We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation to which we referred in Swann is *purpose* or *intent* to segregate." (Footnote omitted; emphasis in original.)

Washington v. *Davis* rejected "the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *soley* because it has a racially disproportionate impact." 426 U.S. at 239 (emphasis in original). Rather, the court held that a plaintiff must prove a purpose or intent to discriminate, 426 U.S. at 239-245. This Court held that this principle applied to school desegregation cases:

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory *purpose*. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause." 426 U.S. at 240 (emphasis added).

Washington v. *Davis* quoted the language from *Keyes* stating that the differentiating factor between unlawful de jure segregation and lawful de facto segregation is purpose or intent to segregate, 426 U.S. at 240. In discussing *Keyes*, the court stated that "the principal issue in litigation was whether and to what extent there had been *purposeful* discrimination resulting in a partially or wholly segregated school system." 426 U.S. at 243-244 (emphasis added).

The holding of *Washington* v. *Davis* was explained in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).[3] This was an action in which plaintiffs complained that denial of rezoning of land from single family to multiple family classification in order to build a racially integrated, low and moderate income housing project was racially discriminatory. This Court stated that *Washington* v. *Davis* "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact" *Arlington Heights, supra,* 429 U.S. at 264-265. *Arlington Heights* held: "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. 429 U.S. at 265. *Arlington Heig' ts* also recognized that plaintiff has the burden of proving the requisite intent, 429 U.S. at 270: "Respondents [plaintiffs] simply failed to carry *their burden* of proving that discriminatory purpose was a motivating factor in the Village's decision." (Emphasis added.) This proof of racially discriminatory intent or purpose can only be adduced by a plaintiff, and thus *Keyes* cannot be read to shift the burden of proof of intent onto defendants simply because of the difficulties of proof for plaintiffs.

This Court's subsequent decision in *Dayton Board of Education* v. *Brinkman* held that the District Court must "first determine whether there was any action in the conduct of the business of the school board *which was intended to, and did in fact, discriminate* against minority pupils, teachers, or staff. Washington v. Davis, supra." 433 U.S. at 420 (emphasis added). Hence this Court's opinion in

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[3] *School District of Omaha* v. *United States*, 433 U.S. 667, 668 (1977), said that this Court "restated and amplified the implications of this [*Washington* v. *Davis*] holding in *Arlington Heights* . . . ."

Dayton Board of Education v. *Brinkman* requires proof of both the purpose and the effect of a school board's action. The District Court in this case so held, *Brinkman* v. *Gilligan*, 446 F. Supp. at 1250.[4]

In applying these standards, the Sixth Circuit was guilty of the error against which Mr. Justice Powell cautioned in *Austin Independent School District* v. *United States*, 429 U.S. 990, 991 (1976), in that it "erred by readiness to impute to school officials a segregative intent far more pervasive than the evidence justified."

That this conclusion is so can be shown by a comparison of the *Keyes* description of de jure segregation with this Court's description of the evidence in this case, in *Dayton Board of Education* v. *Brinkman*. As previously stated, *Keyes* emphasized that the distinguishing factor between de jure segregation and de facto segregation is purpose or intent to segregate. 413 U.S. at 208. Put another way, *Keyes* defined a de jure segregation as "a current condition of *segregation resulting from intentional state action* directed specifically to the core city schools." 413 U.S. at 205-206 (emphasis added). However, this Court in *Dayton Board of Education* v. *Brinkman* found that Dayton is a case "where mandatory segregation by law of the races in the schools has long since ceased," 433 U.S. at 420.

That fact was simply ignored by the Sixth Circuit after this Court's remand. Instead, the Sixth Circuit refused to follow the incremental segregative effect analysis mandated by *Brinkman*, see pp. 14-21, *supra*, and held that the De-

[4] The District Court there stated:

> "This is a critical distinction that must be recognized. Plaintiffs now bear a burden of demonstrating 'any action . . . which was intended to, and *did in fact*, discriminate . . .' *Dayton Board of Education* v. *Brinkman*, *supra*, 433 U.S. at page 420, 97 S.Ct. at page 2775, emphasis added."

fendants-Petitioners had the burden of proof on the incremental segregative effect issue. 583 F.2d at 257-258.

In its 1977 opinion in this case, this Court ordered the lower courts to analyze the facts in this case in light of its opinions in *Washington* v. *Davis* and *Arlington Heights*, *supra*:

> "The District Court, in the first instance, subject to review by the Court of Appeals, *must* make new findings and conclusions as to violations in the light of this opinion, Washington v. Davis, 426 US 229, 48 L Ed 2d 597, 96 S Ct 2040 (1976), and Arlington Heights v. Metropolitan Housing Dev. Corp., 429 US 252, 56 L Ed 2d 450, 97 S Ct 555 (1977). It *must* then fashion a remedy in the light of the rule laid down in Swann, and elaborated upon in Hills v. Gautreaux, 425 US 284, 47 L Ed 2d 792, 96 S Ct 1538 (1976)." 433 U.S. at 419 (emphasis added).

The District Court in this case did so, *Brinkman* v. *Gilligan*, 446 F. Supp. 1232, 1235 (S.D. Ohio 1977), but the Sixth Circuit did not.[5]

The Sixth Circuit's insistence in applying the burden shifting principles of *Keyes* (583 F.2d at 247, 249, 251, 252, 255, and 258) without discussion of *Washington* v. *Davis* and *Arlington Heights* indicates that the Sixth Circuit did not apply the holdings of those cases with respect to a plaintiff's burden of showing the requisite intentional or purposeful discrimination.

Both *Washington* v. *Davis* and *Arlington Heights* post-

[5] Indeed, the only point in the Sixth Circuit opinion in this case at which that court cited *Washington* v. *Davis* or *Arlington Heights* was at 583 F.2d at 249, in which those cases were cited for the proposition that although racial imbalance in student attendance patterns is not in itself a constitutional violation, such racial imbalance may have increased significance in the context of repeated intentional segregative acts.

date *Keyes*. Their holdings that plaintiffs must prove an intent to discriminate[6] are inconsistent with the Sixth Circuit's application of *Keyes* in the instant case. The effect of the Sixth Circuit holding in this case was to repeatedly shift to defendants the burden of proof on discriminatory intent. This was not contemplated by *Washington* v. *Davis* and *Arlington Heights*.[7]

The only way that this Court's opinions in *Washington* v. *Davis* and *Arlington Heights* can be read and applied consistently with *Keyes* is if (1) plaintiffs in desegregation cases are required to prove, without benefit of burden shifting principles, segregation with the requisite purpose or intent "in a meaningful portion of a school system," *Keyes*, 413 U.S. at 208; and only then (2) may the plaintiffs have the benefit of the burden shifting principles of *Keyes*, 413 U.S. at 208-211. In this case the Sixth Circuit erroneously ignored the "meaningful portion of a school system" element of *Keyes*, and simply held that the burden of proof shifted to defendants as to virtually every element of Plaintiffs-Respondents' case. 583 F.2d at 246, 249, 251, 252, 253, 255, 258.

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[6] See *Williams* v. *Anderson*, 562 F.2d 1081, 1086 (8th Cir. 1977), a civil rights action on behalf of black teachers in which the court stated: "These and other decisions establish that the plaintiffs must prove an intent to discriminate on the part of the defendants to prevail in a § 1983 action."

[7] As previously shown, *Arlington Heights* held that plaintiffs-respondents in that case failed to carry their burden of proof of discriminatory purpose, 429 U.S. at 270:

> "Respondents simply failed to carry *their burden of proving* that discriminatory purpose was a motivating factor in the Village's decision." (Emphasis added.)

The court held that "Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." 429 U.S. at 270 n.21.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case should be remanded to the Court of Appeals with instructions to affirm the judgment of the District Court, which dismissed the action.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAR 26 1979
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,

Petitioners,

v.

MARK BRINKMAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

DAYTON BOARD OF EDUCATION, et al.,

Petitioners,

v.

MARK BRINKMAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below

The district court's initial liability ruling of 7 February 1973, now reported at 446 F. Supp. 1254-65 as an appendix to the court's latest ruling, is reprinted in the appendix to the petition for certiorari ("Pet. App.") at pp. 1a-25a. The court's first remedy order was entered 13 July 1973. Pet. App. 26a-31a. The first opinion of the court of appeals is reported as *Brinkman* v. *Gilligan*, 503 F.2d 684 (6th Cir. 1974) (*Brinkman I*). Pet. App. 32a-69a.

On remand from *Brinkman I*, the district court entered orders on 7 January 1975 (Pet. App. 70a-72a) and 10 March 1975. Pet. App. 73a-88a. The court of appeals opinion in *Brinkman II* is reported at 518 F.2d 583 (6th Cir.), *cert. denied sub nom.*, 423 U.S. 1000 (1975). Pet. App. 89-98a.

On remand from *Brinkman II,* the district court entered remedial orders and judgments on 29 December 1975 (Pet. App. 99a-109a), 23 March 1976 (Pet. App. 110a-13a), 25 March 1976 (Pet. App. 114a-16a) and 14 May 1976. Pet. App. 117a. The court of appeals' opinion in *Brinkman III* is reported at 539 F.2d 1084 (6th Cir. 1976). Pet. App. 118a-23a. This Court's opinion, vacating and remanding, is reported as *Dayton Bd. of Educ.* v. *Brinkman,* 433 U.S. 406 (1977) (*Dayton I*). Pet. App. 124-41a.

On remand from *Dayton I,* the district court filed an opinion dismissing the complaint on 15 December 1977, which is reported at 446 F. Supp. 1232 (S.D. Ohio). Pet. App. 142a-88a. The court of appeals' opinion in *Brinkman IV* is reported at 583 F.2d 243 (6th Cir. 1978). Pet. App. 189a-217a. This Court granted certiorari on 8 January 1979.

Counterstatement of Questions Presented

Whether, as the court of appeals held below, the Dayton Board of Education was operating a basically dual school system at the time of trial, necessitating a systemwide desegregation remedy?

Counterstatemenet of the Case

A. Prior Proceedings.

This suit commenced on 17 April 1972 with the filing of a complaint by black parents and their school children[1]

[1] In their petition for certiorari (pp. 20-21) and in their brief (pp. 54-56), petitioners make a frivolous attack on plaintiffs' standing to sue. Despite the fact that this issue had been resolved against petitioners by the district court and by the court of appeals in

seeking to disestablish the racially dual system of public schooling in Dayton, Ohio, pursuant to the Thirteenth and Fourteenth Amendments and their contemporaneous implementing legislation, 42 U.S.C. §§1981 and 1983-1988. Complaint, ¶¶1, 12. Defendants included the Dayton Board of Education, its individual members and Superintendent of Schools and the State Board of Education and responsible state officials. Complaint, ¶¶4-10. Following extensive admissions by all defendants (App. 53-78),[2] the trial judge conducted an evidentiary hearing from 13 November to 1 December 1972, limited to whether the acts of the Dayton Board "have created segregated educational facilities in violation of the Equal Protection Clause." Pet. App.

Brinkman I, it was resurrected by petitioners before this Court in *Dayton I.* We responded by demonstrating that individual respondents have a real present-day stake in this litigation, and that the case has properly proceeded as a class action. *See* Brief for Respondents at 95-101 in *Dayton Bd. of Educ.* v. *Brinkman,* No. 76-539. Although petitioners' standing argument was a jurisdictional one, which the Court would have been obliged to look into even on its own motion, *cf. City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973), the Court's opinion in *Dayton I* elected not to address the standing argument and proceeded on the basis that jurisdiction was established. Petitioners' standing contention was thus necessarily resolved against them in *Dayton I;* and, on remand therefrom, they did not renew the argument either in the district court or in the court of appeals. They are therefore foreclosed from relitigating that issue in this Court. In all events, the issue must be resolved in respondents' favor, for the reasons set forth in our brief in *Dayton I,* cited above.

[2] "App." references are to the three-volume appendix filed herein. When the exhibit volume is referred to, the page number is followed by "Ex." Trial exhibits not reproduced in the exhibit volume of the appendix are designated "PX" for plaintiffs' exhibits and "DX" for defendants' exhibits. References to the original transcript are designated as follows: "R.I." for the twenty-volume, consecutively-paginated transcript of the violation hearing in November and December 1972; "R.II." for the February 1975 remedial hearings; "R.III." for the remedial hearings in December 1975 and March 1976; and "R.IV." for the November 1977 hearing on remand from this Court.

2a; also Pet. App. 34a, 143a, 188a.[3] The plaintiffs introduced substantial additional evidence showing that the Dayton public schools had been riven by a long and continuous history of intentional system-wide segregation leading to the creation and maintenance of a basically dual system from long before *Brown* through the time of trial; the defendants countered by arguing that any discrimination had only minor effect and, in any event, had been dissipated by the passage of time. The district court issued an opinion on 7 February 1973 finding "racially imbalanced schools, optional attendance zones, and recent Board action [i.e., the 3 January 1972 rescission of a system-wide program of desegregation], which are cumulatively in violation of the Equal Protection Clause." Pet. App. 12a.[4] By its 13 July 1973 supplemental order on remedy, the district court approved a "plan" eliminating optional zones and required a "free choice" election process for in-coming high school students, based on its read-

[3] Plaintiffs filed the action in the Columbus rather than the Dayton division of the district court because of the joint and independent allegations against the State level agencies and officials, all located in Columbus. The district court denied defendants' motions to dismiss for improper venue or, in the alternative, for transfer to the Dayton division on these grounds. *E.g.*, Pet. App. 33a. Yet the trial judge then deferred hearing on the claims against the State defendants; and, to date, these claims, as well as those against all defendants arising under the Thirteenth Amendment and the applicable federal civil rights statutes, 42 U.S.C. §§1981 and 1983-1988, have never been heard. (At the beginning of the November 1972 trial, Judge Rubin noted that "[t]his is a limited hearing on this case and it is intended to be a preliminary inquiry." App. 1.)

[4] The district court determined that the case was a "class action by the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education." Pet. App. 1a. The court also credited plaintiffs' pre-*Brown* evidence of official racial discrimination as the policy of the Dayton Board (Pet. App. 2a-4a), but it did not relate that conduct to the evidence of post-*Brown* discrimination nor otherwise attach any legal significance to it. *E.g.*, Pet. App. 3a.

ing of Mr. Justice Powell's dissenting opinion in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 226-227 (1973). Pet. App. 29a-31a.

The Dayton Board appealed, claiming that there was no continuing constitutional violation; and plaintiffs cross-appealed, contending that the district court had erred in failing to make additional violation findings relating to almost all aspects of the operation of the Dayton public schools and that the remedy ordered failed to overcome the pervasive effect of the proven violations, including the deliberate perpetuation of a basically dual system from the time of *Brown* through the time of trial. In its 20 August 1974 opinion in *Brinkman I*, 503 F.2d 684 (Pet. App. 32a), the court of appeals discussed at somewhat greater length than had the district court both the pre-*Brown* evidence of intentional discrimination (Pet. App. 39a-40a) amounting to a "basically dual system" (Pet. App. 56a) and the "serious questions" (Pet. App. 66a) as to whether the Board's conduct following *Brown* relating, for example, to staff assignment, new school construction and reorganization, should have been included within the "cumulative violation" of the Equal Protection Clause found by the district court. Pet. App. 56a-67a. But the court of appeals reserved ruling on these issues, rather than expressly supplement or reverse the constitutional violation findings of the district court as requested by plaintiffs in one prong of their cross-appeal. Pet. App. 56a, 67a; also Pet. App. 194a. Thus, the court of appeals only affirmed the three-part "cumulative violation" (Pet. App. 67a) but, nevertheless, reversed the trial judge's remedy and remanded for development of a plan of broader scope. Pet. App. 68a-69a.

Following additional remedial proceedings on remand in the district court (Pet. App. 70a. 73a), the court of ap-

peals in its 24 June 1975 opinion in *Brinkman II* directed promulgation and implementation of "a system-wide plan for the 1976-77 school year" without reaching the reserved issues. 518 F.2d 853, 857 (Pet. App. 96a). On remand, following the appointment of an expert (murdered in the midst of his desegregation planning in the Federal Building in Dayton), the appointment of a master, and evidentiary hearing (Pet. App. 99a-106a), the district court approved a system-wide plan pursuant to orders of 23 March and 14 May 1976. Pet. App. 110a, 117a. On appeal by the Dayton Board, the court of appeals affirmed, again without reaching the reserved questions. 539 F.2d 1084 (Pet. App. 118a). Following denials of stays by the court of appeals and Circuit Justice Stewart, the system-wide plan was implemented in September 1976 and has successfully operated to this day without disruption.

On certiorari, this Court reviewed the proceedings and opinions below. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) (hereafter *"Dayton I"*). Noting the ambiguity of the district court's opinion (433 U.S. at 412-14), the Court evaluated each aspect of the three-part "cumulative violation" holding and determined that, at most, any constitutional violation related solely to "high school districting," i.e., "optional attendance zones for . . . three Dayton high schools." 433 U.S. at 413. The Court admonished the court of appeals for failing to review—i.e., to affirm, to supplement or to reverse (in contrast to "to discuss")—the limited and ambiguous violation findings of the district court in view of the extensive record evidence of intentional segregation concerning all aspects of the historic and continuing operation of the Dayton public schools. 433 U.S. at 416-18. Left only with the limited findings of the district court, this Court held that the court of appeals erred in imposing a system-wide plan for violations of patently lesser scope, i.e., optional zones affecting only three high schools. 433 U.S. at 417-18. In view of the confusion at various stages in the courts below and the substantial claim that the extensive record revealed additional violations, the Court therefore remanded for thorough judicial review and detailed findings but left the system-wide plan in effect pending further proceedings. 433 U.S. at 418-21.

Pursuant to this Court's mandate, the court of appeals remanded the case to the district court for further proceedings. 561 F.2d 652. The district court conducted a brief evidentiary hearing, 1-4 November 1977, again limited to the intentionally discriminatory conduct of the Dayton Board. Nevertheless, the district court dismissed the plaintiffs' complaint by opinion and judgment issued 15 December 1977. Pet. App. 142a. The opinion is based solely upon finding no continuing violation of the Equal Protection Clause (Pet. App. 188a) and makes no determination concerning the plaintiffs' claims against the State defendants and claims arising under the Thirteenth Amendment and federal civil rights acts (42 U.S.C. §§1981, 1983-1988) against all defendants. *See* note 1, *supra*. The opinion begins by noting: "The course of this protracted litigation has been marked by conceptual differences not only as to the facts, but as to the legal significance of those facts." Pet. App. 143a. Still guided by Mr. Justice Powell's minority view (quoting the separate opinion in *Austin Independent School Dist.* v. *United States*, 429 U.S. 990, 995 and n.7 (1976); *see* Pet. App. 146a-47a), the district court applied a restrictive view (*e.g.*, Pet. App. 153a, 157a-60a, 162a-69a, 171a, 180a) of this Court's decision in *Dayton I* with respect to causation and effect. Pet. App. 146a-47a; also Pet. App. 149a, 154a, 159a, 171a. The district court then proceeded to resolve all disputed facts concerning in-

tent against the plaintiffs and further determined that the numerous admitted or uncontroverted intentionally segregative and discriminatory policies and practices of the Dayton Board were isolated, attenuated, or otherwise had no current "incremental segregative effect." *E.g.*, Pet. App. 149a, 154a, 159a, 171a.

Plaintiffs promptly appealed. On 5 January 1978, the district court denied plaintiffs' motion to stay the judgment dismissing the case pending appeal; on the same day the Dayton Board voted to reinstate pupil segregation beginning with the second semester. On 16 January 1978, the court of appeals (a) granted plaintiffs' motion to stay the termination of the plan pending appeal and (b) expedited the appeal.

The court of appeals, pursuant to the standards for appellate review articulated by this Court in *Dayton I*, 413 U.S. at 416-18, reviewed in its opinion (for the first time) the trial judge's findings concerning equal-protection violations against the bulk of the evidence of intentional segregation. The appellate court concluded that the district judge's findings were clearly erroneous and his conclusions were plainly wrong in all material respects. *E.g.*, Pet. App. 194a and n.10, 196a, 199a, 202a, 206a, 210a, 211a, 212a. The court below found that the record evidence "demonstrates conclusively" (Pet. App. 194a) the following:

> (1) The Dayton Board, through explicit policies and covert practices amounting a system-wide program of segregation, operated a basically dual system at the time of *Brown*. Pet. App. 194a-205a.
>
> (2) The Dayton Board refused at all times thereafter to take any action to dismantle this dual system. Pet. App. 205a-06a, 208a-09a, 216a.

> (3) The Dayton Board opted instead to perpetuate and to build upon the continuing dual system through the time of trial by a variety of intentionally segregative policies and practices, including racially motivated faculty and staff assignment, optional zones, school construction, and reorganizations of grade structure. Pet. App. 206a, 209a-14a.
>
> (4) The Dayton Board failed to show in what respect the pattern of one-race schools was not caused by the system-wide impact of this longstanding, systematic program of intentional segregation (Pet. App. 209a); instead, the direct evidence of the Dayton Board's intentionally segregative conduct following *Brown* showed that it had perpetuated and compounded the basically dual system through the time of trial through a variety of segregative practices of systemwide nature and impact. Pet. App. 216a-17a.

As a result, the court of appeals reversed the decision of the district court on constitutional grounds and continued the systemwide desegregation plan which has been in operation since September 1976. Pet. App. 217a.

Following denials of the Dayton Board's applications for a stay of judgment by the court of appeals, Circuit Justice Stewart and Associate Justice Rehnquist, this Court granted certiorari on 8 January 1979.

B. The Dayton School District: General Geography and Demography.

As reflected in the report (App. 34-35) of the Master previously appointed by the district court, the city of Dayton has a population of 245,000 and is located in the east-central part of Montgomery County in the southwestern part of the state of Ohio, approximately 50 miles

due north of Cincinnati. The Dayton school district is not coterminous with the city; some parts of the school district include portions of three surrounding townships and one village, while some portions of the city are included in the school district of three adjacent townships. The total population residing within the Dayton school district boundaries is 268,000; the school pupil population is 45,000, about 50% of whom are black. Prior to implementation of the desegregation plan now in effect, the vast majority of black and white pupils had separately attended schools either virtually all-white or all-black in their pupil racial composition. E.g., Pet. App. 48a-51a; App. 1-5-Ex. (PX 2A-2E), 212-16-Ex. (PX 100A-100E), 321-22-Ex. (DX CU).

The Dayton district is bisected on a north/south line by the Great Miami River. Historically, the black population has been concentrated in the south-central and southwest parts of the city, primarily on the west side of the Miami River and south of the east-west Wolf Creek, both of which have long been effectively crossed at convenient intervals, both literally and by school policies and practices. *See, e.g.,* maps in pocket part of appendix exhibit volume. The area of black containment was originally quite small and grew from 1913 through the time of trial reciprocally with school board policies and practices designed to separate black pupils and staff from white. *See* pp. 12-67, *infra.* The black population originally was contained in the southwest quadrant, but there is now also a substantial black population in the northwest quadrant across Wolf Creek. Extreme northwest Dayton and most of the city east of the Miami River are and have been heavily white in residential racial composition. *See, e.g.,* App. 306-09-Ex. (DX BY) (census tract maps). The district court made the following finding as to the causes of such residential segregation (Pet. App. 147a-48a) (record citations and footnote omitted):

> Since shortly after the 1913 flood, Dayton's black population has centered almost exclusively on the West Side of Dayton. . . . Since that time this population has moved steadily north and west. . . . Without question the prime factor in this concentration has been housing discrimination, both in the private and public sector. Until recently, realtors avoided showing black people houses which were located in predominantly white neighborhoods. . . . In the 1940's, public housing was strictly segregated according to race. . . . This segregated housing pattern has had a concomitant impact upon the composition of the Dayton public schools.

See also, e.g., App. 80-83, 220-22-Ex. (PX 1433), 223-33-Ex. (PX 143J), R.I. 189-210, PX 143E-M) (public housing and relation to school discrimination); App. 143-48, R.I. 656, 663-65, PX 153-153B (Sloane, PHA, VA, FHA, and relation to school discrimination); R.I. 881-84, 897-925, 952-53, App. 176-79 (Taeuber, residential and school segregation and discrimination); App. 518-22, R.I. 782-93, 2084-2106 (offers of proof), PX 144 and 144A and R.I. 758-61 (local customs of housing and school segregation).[5]

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[5] From such testimony, evidence and offers of proof, it is manifest that the trial court's quoted finding—that in Dayton both official racial discrimination and the dominant white community's custom and practice of racial exclusion (compared to other factors like choice, economics, birth rates or in-migration) have been primary causal elements in the marked historic and continuing residential segregation—is indisputable. (One of the issues still in much dispute in this case, however, is whether *school* discrimination contributed to the prevailing local custom and practice of almost complete residential segregation; whether *school* policies and practices were also motivated, at least in some significant part, by the racial discrimination prevailing in other aspects of the local community; and whether *school* discrimination and segregation operated reciprocally with such residential discrimination and segregation to create and perpetuate a *dual school system.* This is

(Footnote continued on next page)

Geographically and topographically there have been and are no major obstacles to complete desegregation of the Dayton school district. Pet. App. 121a. The Master determined that where pupil transportation is necessary, the maximum travel time would be about twenty minutes. App. 39. As found by the Board's experts, due to the compact nature of the system, "the relative closeness of the Dayton Schools makes long-haul transportation[,] an issue in many cities[,] moot here." App. 438.

C. The Pre-*Brown* Dual System.

In 1887 the state of Ohio repealed its school segregation law and attempted to legislate the abolition of separate schools for white and black children. 85 Ohio Laws 34. That statute was sustained the following year by the Supreme Court of Ohio. *Board of Education* v. *State*, 45 Ohio St. 555, 16 N.E. 373 (1888). Although the Ohio courts had occasion, some forty years later, specifically to remind Dayton school authorities of this legal prohibition of separate schools for black and white children, the laudable goals of the 1887 legislation were not attained in Dayton

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[5] (Continued)
one of the issues that is addressed in the remainder of this brief. It is sufficient for present purposes to note that the district court's limited findings do not answer the issue: for, even while crediting evidence such as that cited above, it totally failed to consider these same witnesses' experience with the two-way, causally interwoven, and reciprocal relationship between school discrimination and segregation and housing discrimination and segregation in the Dayton community. As we demonstrate in the Statement and Argument hereafter, the evidence conclusively demonstrates that segregative intent was a primary motivation in the Dayton Board's creation, perpetuation, and compounding of a dual school system, pursuant both to explicit segregation policies and covert segregation practices, that did in fact proximately cause or materially contribute to the systematic pattern of one-race schooling extant at the time of trial.)

until implementation of the desegregation plan now in effect at the start of the 1976-77 school year.

Many of the facts which follow in this section were admitted by all Dayton Board defendants in their responses to plaintiffs' pre-trial Requests for Admissions. *See* App. 53-78. These facts were also the subject of extensive and largely uncontroverted evidence at trial.

The facts of racial segregation in the Dayton public schools, as revealed by the record before the Court, begin in 1912. In that year Louise Troy, a black teacher, taught an all-black class just inside the rear door of the Garfield school; all other classes in this brick building were occupied by white pupils and white teachers. App. 137. About five years later, four black teachers and all of the black pupils at Garfield were assigned to a four-room frame house located in the back of the brick Garfield school building with its all-white classes; and soon a two-room portable was added to the black "annex," making six black classrooms and six black teachers located in the shadow of the white Garfield school. App. 137-38. A four-room "permanent" structure was later substituted for the two-room portable (about 1921 or 1922), and eight black teachers were thus assigned to the eight all-black classrooms in the Garfield annex. App. 139. *See also* App. 53, 64, 73 (admission no. 1).

When Mrs. Ella Lowrey, a black teacher for several decades in the Dayton system, performed her practice-teaching requirement with the black students in the "annex" at Garfield in 1917, the four all-black classrooms contained 50 students each. App. 138. When the permanent structure replaced the two-room portable in the early 1920's, Mrs. Lowrey taught a sixth-grade class of 62 black children, before which she had taught a fourth-grade class of 42

black children while her white counterpart in the main "white" building had a class of only 20 white children. R.I. 624-25; App. 139. In Mrs. Lowrey's words, "doing 40 years service in all in Dayton, . . . I never taught a white child in all that time. I was always in black schools, black children, with black teachers." App. 143. [At one time during this early history prior to 1931, one black teacher, Maude Walker, taught an ungraded class of black boys at the Weaver school. All other black teachers in the system were assigned to the black annex at Garfield. App. 93.]

About 1925 school authorities learned that two black children, Robert Reese and his sister, had been attending the Central school under a false address, even though they lived near the Garfield school. They had accomplished this subterfuge by walking across a bridge over the Miami River. The Reese children were ordered by school authorities to return to the Garfield school, but their father refused to send them to the black Garfield annex. Instead, he filed a lawsuit in state court seeking a writ of mandamus to compel Dayton school authorities to admit children of the Negro race to public schools on equal terms with white children. R.I. 526-29; App. 115-16. In a decision entered of record on 24 December 1925, the Court of Appeals of Ohio denied a demurrer to the mandamus petition. This decision was affirmed by the Ohio Supreme Court and Dayton school authorities were specifically reminded that state law prohibited distinctions in public schooling on the basis of race. *Board of Education of School District of City of Dayton* v. *State ex rel. Reese,* 114 Ohio St. 188, 151 N.E. 39 (1926). *See* App. 53, 64-65, 73 (admission no. 2).

During the pendency of the Reese case, the eight black teachers assigned to the Garfield annex were employed on a day-to-day basis because school authorities did not know

whether the black teachers were going to be in the Dayton system after the lawsuit. Black teachers would not be needed if the courts required the elimination of all-black classes, since the Board deemed black teachers unfit to teach white children under any circumstances. App. 139-40; *see also* App. 186.

Following the state court decision, Robert Reese and a few of his black classmates were allowed to attend school in the brick Garfield building, but the black annex and the white brick building were otherwise maintained. Black children were allowed to attend classes in the brick building only if they asserted themselves and specifically so requested; otherwise, they "were assigned to the black teachers in the black annex and the black classes." App. 140-41.

During this time, there apparently were some other black children also in "mixed" schools. For example, Mrs. Phyllis Greer, who had direct contact with the Dayton public schools over a fifty-year span as student, teacher, principal and central administrator in charge of "equal educational opportunity" review (App. 85-86), attended "mixed" classes at Roosevelt high school for three years prior to 1933. App. 89-90. But even when they were allowed to attend so-called "mixed" schools, these black children were subjected to humiliating discriminatory experiences within school. At Roosevelt, for example, black children were not allowed to go into the swimming pool and blacks had separate showers while Mrs. Greer was there (App. 89); while Robert Reese was at Roosevelt (after leaving Garfield), there were racially separate locker rooms, and blacks were allowed to use the swimming pool but not on the same day as whites. App. 116. At Steele High School, black children were not allowed to use the pool at all during this period. App. 423-24. Even in the "mixed" classrooms

black children could not escape the official determination that they were inferior beings because of the color of their skin. Mrs. Greer vividly remembers, for example, "when I went to an eighth grade social studies class I was told by a teacher, whose name I still remember, . . . that even though I was a good student I was not to sit in front of the class because most of the colored kids sat in the back." App. 90. And she remembers with equal clarity that, while in the second grade at Weaver, she "tried out for a Christmas play and my teacher wanted me to take the part of an angel and the teacher who was in charge of the play indicated that I could not be an angel . . . because there were no colored angels." App. 88-89.

Also, throughout this period, and until 1954, black children from a mixed orphanage, Shawen Acres, were assigned across town to the black classes in the black Garfield school (and also to the blacks-only Dunbar secondary school, discussed *infra*), while the white orphan children were assigned to nearby white classes and white schools. App. 87-88, 523-24, 525. This practice was terminated following the *Brown* decision in 1954 at a time when the black community in Dayton was putting pressure on the school administration to stop mistreating black children. App. 184-Ex. (PX 28); App. 55, 67, 74 (admission no. 7 (d)).

The black pupil population continued to grow at Garfield, and another black teacher was hired and assigned with an all-black class placed at the rear door of the brick building. App. 141. In 1932 or 1933, Mrs. Lowrey (*see* p. 13, *supra*), was also placed in the brick building, again with an all-black class "in a little cubby-hole upstairs," making ten black teachers with ten black classes at Garfield. App. 142. Finally, around 1935-36, after many of the white children had transferred out of Garfield, school

authorities transferred all the remaining white teachers and pupils in the brick building to other schools and assigned an all-black faculty, principal and student body to Garfield. App. 94, 142-43, 234-Ex. (PX 150 I); PX 155 (faculty directories); *see also* App. 54, 65, 73 (admission no. 2).

As the black pupil population was growing rather rapidly during the 1930's, not even the conversion of Garfield into a blacks-only school was sufficient to accommodate the growth. So, with the state court decision in *Reese* then some nine years old, the Dayton Board also converted the Willard school into a black school. The conversion process was as degrading and stigmatizing as had been the creation and maintenance of the Garfield annex and the ultimate conversion of the brick Garfield into a black school. In the 1934-35 school year, six black teachers (who were only allowed to teach black pupils) and ten white teachers had been assigned to the Willard school. In September of 1935, the Board transferred all white teachers and pupils to other schools, and Willard became another school for black teachers and black pupils only. App. 93, 234-Ex. (PX 150 I); PX 155 (faculty directories); App. 54-55, 66, 74 (admission no. 6).

At about this same time, in 1933, the new Dunbar school, with grades 7-9, opened with an all-black staff and an all-black student body. App. 234-Ex. (PX 150 I). Mr. Lloyd Lewis, who was present at its inauguration, testified that the Dunbar school "was purposely put there to be all black the same as the one in Indianapolis [the Crispus Attucks school, *see United States* v. *Board of School Comm'rs*, 332 F. Supp. 655, 665 (S.D. Ind. 1971)] that I had left." R.I. 1378; App. 530-33, 550-52. The Board resolution opening Dunbar stated that grades 7 and 8 were to be discontinued at Willard and Garfield (these two black elementary schools

served grades 7 and 8, whereas the system prior to 1940 was otherwise generally organized on a K-6, 7-9, 10-12 grade-structure basis, App. 387), and that "attendance at the Dunbar School be optional for all junior high students for all 7th, 8th, and 9th grade levels in the City." App. 191, 259-Ex. (PX 161A). Of course, this meant only all *black* junior high students, since Dunbar had an all-black staff who were not permitted by Board policy to teach white children. App. 93, 191, 297; PX 155 (faculty directories).

Within a very short time, grades 10, 11 and 12 were added to the blacks-only Dunbar school. Then in 1942, just two years after the Dayton school authorities had reorganized all schools to a K-8, 9-12 grade structure, the Board again assigned the seventh and eighth grades from the all-black Willard and Garfield schools to the all-black Dunbar school. App. 191, 260-Ex. (PX 161B). Black children from both the far northwest and northeast sections of the school district traveled across town past many all-white schools to the Dunbar school. App. 97-98, 211, 214, 296-97. Many white children throughout the west side of Dayton were assigned to Roosevelt high school past or away from the closer but all-black Dunbar high school. Although some black children were allowed to attend Roosevelt, those who became "behavior problems" were transferred to Dunbar. App. 91. And other black children from various elementary schools were either assigned, channeled, or encouraged to attend the black Dunbar high school. App. 124-25, 214, 250-51.[6] The most effective means

[6] Prior to 1940, no high schools had attendance boundaries. App. 393-94. The black Dunbar school was located in close proximity to the Roosevelt high school which, although it always had space, apparently had too many black children. Along with Steele and Stivers, these high schools were located roughly in the center of the city and served high school students throughout the city. (In addition, the Parker school had been a city-wide single-grade school which served ninth graders. App. 408-09.) In 1940 attendance boundaries were drawn for the high schools with the exception of Dunbar and a technical school (whose name varied), both of which long thereafter remained as city-wide schools. *See* p. 45, *infra*.

of forcing black children to attend the blacks-only Dunbar, of course, was the psychological one of branding them unsuited for association with white children. *See* pp. 15-16, *supra*. As Mr. Reese testified, he "chose" Dunbar over Roosevelt after suffering the humiliation of being assigned to separate locker rooms, separate showers, and separate swimming pools at Roosevelt: "I wanted to be free. I felt more at home at Dunbar than I did at Roosevelt. . . . You couldn't segregate me at Dunbar." App. 116-17. Similarly, Mrs. Greer testified: "I went to Dunbar because I felt that if there was going to be—if we were going to be separated by anything, we might as well be separated by an entire building as to be separated by practices." App. 90. (Dunbar was also excluded from competition in the city athletic league until the late 1940's, thereby requiring Dunbar teams to travel long distances to compete with other black schools, even those located outside the state. App. 90, 123, 133-34; R.I. 570.) *See also* App. 55, 67, 74 (admission no. 7).

Even these segregative devices were not sufficient to contain the growing black population. So between 1943 and 1945, the Board, by way of the same gross method utilized to convert the Willard school into a black school, transformed the Wogaman school into a school officially designated unfit for whites. White pupils residing in the Wogaman attendance zone were transferred by bus to other schools, to which all-white staffs were assigned. By September 1945 the Board assigned a black principal and an all-black faculty with an all-black student population to

the Wogaman school. App. 90-91, 123-24, 234-Ex. (PX 150 I); PX 155 (faculty directories); App. 54, 66, 74 (admission no. 4).

Still other official devices were used to keep blacks segregated in the public schools. One such device, resorted to regularly during the 1940's and early 1950's, was to cooperate with and supplement the discriminatory activities of Dayton public housing authorities. Throughout this period, racially-designated public housing projects were constructed and expanded in Dayton, subject to Board approval.[7] App. 80-83, 220-222-Ex. (PX 143 B). In 1942, the Board transferred the black students residing in the black De-Soto Bass public housing project to the Wogaman

[7] App. 143-45. The district court had earlier refused to admit *any* proof related to public housing and the school authorities interaction therewith, including even the leasing of space and assignment of one-race classes and staffs to rooms in the racially designated projects, "until [plaintiffs] can establish that the School Board participated in some fashion with the original determination that this would be a white or black project [. W]hatever else the Board might have done, they have taken the area as they found it." App. 79. Although plaintiffs then produced evidence to meet the trial judge's major premise (and other evidence to show how the Board also intentionally advantaged itself of the explicitly dual public housing administration), the district court's only findings concerning the hotly-disputed segregative interrelationships between the school and public housing authorities are contained in these words (Pet. App. 147a-48a):

> In the 1940's public housing was strictly segregated according to race. (T.R.1 182-186). This segregated housing pattern [public and private] has had a concomitant impact upon the composition of the Dayton public schools (T.R.2-380, 382-Robert Rice).

The trial court made no findings concerning the Board's conduct in relation to public housing. In contrast, the court of appeals found from the uncontroverted evidence that the school authorities "operated one race classrooms in officially one race housing projects which the district court found were 'strictly segregated according to race,'" Pet. App. 201a and n.35.

school (App. 260-Ex. (PX 161 B)), and a later overflow to the all-black Willard school, rather than other schools that were equally close (App. 92), while transferring white students from the white Parkside public housing project to the McGuffey and Webster schools and the eighth grades from those schools to the virtually all-white Kiser school. App. 260-Ex. (PX 161B). Finally, in the late 1940's and early 1950's, the Board leased space in white and black public housing projects for classroom purposes, and assigned students and teachers on a uniracial basis to the leased space so as to mirror the racial composition of the public housing projects. App. 82-83, 223-33-Ex. (PX 143 J).

By the 1951-52 school year (the last year prior to 1963-64 for which enrollment data by race are available), there were 35,000 pupils enrolled in the Dayton district, 19% of whom were black. There were four all-black schools, officially designated as such, on the west side of Dayton: Willard, Wogaman, Garfield and Dunbar. These schools had all-black faculties and (with one exception, an assignment made that school year) *no* black teachers taught in any other schools. App. 10-Ex. (PX 3). In addition, there were 22 white schools with all-white faculties and all-white student bodies. And there was an additional set of 23 so-called "mixed" schools, 7 of which had less than 10 black pupils and only 11 of which had black pupil populations greater than 10% (ranging from 16% to 68%). App. 216-Ex. (PX 100E). The schools with any racial mix, however, were also marked by patterns of racially segregative and discriminatory practices within the schools, and, with the one exception noted above, none had any black teachers. Eighty-three percent of all white pupils attended schools that were 90% or more white in their pupil racial composition. Of the 6,628 black pupils in the system, 3,602 (or 54%) attended the four all-black schools with all-black

staffs; and another 1,227 (or 19%) of the system's black pupils were assigned to the adjacent schools which were about to be converted into "black" schools (*see* pp. 25-27, *infra*). Thus, 73% of all black students attended schools already or soon to be designated "black." App. 2-Ex. (PX 2B), 216-Ex. (PX 100E).[8]

[8] *The District Court's Opinion* (Pet. App. 147a-49a, 151a-52a, 153a, 158a-59a, 169a-71a). Virtually all of the subsidiary facts set forth to this point in this section are not in dispute. Many of them are the subject of findings by the district court (although they are peppered throughout its opinion as though they were each unrelated to the other) and while others (*e.g.*, the *Reese* litigation, the conversion of Garfield, Willard and Wogaman into blacks-only schools, and the specifics of the Board's entanglement with public housing discrimination) were ignored by the district court, the court's opinion does not conflict with these undisputed facts. Thus, the district court finds that "public housing was strictly segregated according to race" (Pet. App. 147a-48a) (*cf.* note 7, *supra*); that the Board segregated many black children and discriminated against the few others who attended predominantly white schools in accordance with "an inexcusable history of mistreatment of black students" (Pet. App. 149a); that "until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative" (Pet. App. 153); that the discriminatory transfer of black children from Shawen Acres Orphanage to the blacks-only Garfield school was "arguably. . . a purposeful segregative act" (Pet. App. 159a); and that "the first Dunbar High School was intended to be and was in fact a black high school." Pet. App. 170a. The district court, however, refused to determine whether these "incidents of purposeful segregation" amounted to a systemwide policy of intentional segregation or otherwise rendered the system dual at any time.

The Court of Appeals' Opinion (Pet. App. 195a-96a, 197a, 198a-201a, 203a). The court of appeals made extensive specific findings substantially in accord with the subsidiary facts heretofore described in text. In only two instances did the court of appeals find it necessary to question a subsidiary district court finding. First, with respect to the trial court's statement that the policy of assigning the black Shawen Acres Orphanage children to the blacks-only schools rather than to nearby white schools was "arguably. . . a purposeful segregative act" (Pet. App. 159a), the court of appeals concluded that "[t]o the extent that this finding implies that this practice was *not* purposefully segregative, it is clearly erroneous." Pet. App. 199a (emphasis in original.)

In 1951 and 1952 the Dayton Board confronted its last pre-*Brown* opportunities to correct the officially-imposed school segregation then extant. Instead, the Board acted in a manner that literally cemented in the dual system and promised racially discriminatory public schooling for generations to come. What the Board did involved a series of interlocking segregative maneuvers, which substantially expanded the separation of black from white children and staff, primarily through implementation of a new and overt faculty segregation policy, the use of "optional attendance zones," and the construction of an additional all-black school.

Prior to this time, as previously noted, the Board would not allow black teachers to teach white children under any circumstances (App. 186); black teachers were assigned only to all-black schools, and white teachers were assigned only to white and "mixed" schools. In the 1951-52 school year, in purported response to black community pressure, the Board announced a "new," but equally demeaning, faculty segregation policy (App. 182-Ex. (PX 21)):

Second, the court of appeals credited the Board's admissions and the uncontradicted documentary and testimonial evidence showing that the Board "pursued an overt policy of faculty segregation. . . . Defendants admitted that prior to 1951 the board forbade the assignment of black teachers to white or mixed classrooms 'pursuant to an explicit segregation policy.'" Pet. App. 195a and n.11. In contrast, the trial court made the clearly erroneous finding that "[t]here is no direct evidence that black teachers were forbidden to teach white children at any school." Pet. App. 151a. Although the Sixth Circuit also supplemented the findings concerning many significant facts (virtually all of them uncontradicted) which had been ignored by the trial court, these two are the only instances relating to the 1912-1952 period in which the appellate court arrived at a subsidiary factual conclusion which was in conflict with a district court finding. The court of appeals, however, also inquired whether this pattern of intentionally segregative conduct amounted to an official Board policy of segregation and rendered the Dayton system dual. *See* notes 9, 11 and 13, *infra*, and 4, 5 and 7, *supra*.

> The school administration will make every effort to introduce some white teachers in schools in negro [*sic*] areas that are now staffed by negroes [*sic*], but it will not attempt to force white teachers, against their will, into these positions.
>
> The administration will continue to introduce negro [*sic*] teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro [*sic*] teachers.

This faculty policy, incredibly, was contained in a statement of the Superintendent disavowing the existence of segregated schools in the Dayton district.

In 1954 the Superintendent made a further "integration statement," which included the following (App. 184-Ex. (PX 28)):

> About two years ago we announced a policy of attempting to introduce white teachers in our schools having negro [*sic*] population. We have not been too successful in this regard and at the present time have only 8 full or part-time teachers in these situations. There is a reluctance on the part of white teachers to accept assignments in westside schools and up to the present time we have not attempted to use any pressure to force teachers to accept such assignments. The problem of introducing white teachers in negro [*sic*] schools is more difficult than the problem of introducing negro [*sic*] teachers into white situations. There are several all-white schools which in the near future will be ready to receive a negro [*sic*] teacher.

As will be seen (*see* pp. 32-37, *infra*), this express faculty segregation policy continued for almost two more decades

as a primary device for identifying schools as intended for blacks or whites.[9]

In the school year following the announcement of the "new" faculty segregation policy, the Board remained under pressure, as its records reflect, from "[t]he resistance of some parents to sending their children to school in their district because it is an all negro [*sic*] school." App. 209-Ex. (PX 75). In response, the Board constructed a new all-black school (Miami Chapel) located near the all-black Wogaman school and adjacent to the black DeSoto Bass public housing project; Miami Chapel opened in 1953 with

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[9] *The District Court's Opinion* (Pet. App. 151a-53a). The district court correctly concluded that "until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative." Pet. App. 153a. But the court attempts to ameliorate the harsh racism of the 1951-52 policy change by characterizing it as a "policy of dynamic gradualism" (*id.*) which "was substantially implemented during the 1950's and 1960's." *Id.* at 152a. The policy itself, quoted above, speaks louder and clearer than the district court's ameliorative efforts, which are clearly erroneous. The court also erred in not recognizing the Board's faculty policies as the hallmark of the Dayton-style dual system. (The court's continuing errors, with respect to post-*Brown* faculty-assignment practices, are treated at pp. 36-37, *infra*.)

The Court of Appeals' Opinion (Pet. App. 195a-96a, 197a, 202a-03a). The Sixth Circuit characterized the Board's faculty-assignment policy as "an overt policy of faculty segregation" (Pet. App. 195a), "an explicit segregation policy" (*id.*), "purposeful segregation of faculty by race" (*id.* at 197a), and "deliberate policy of faculty segregation." *Id.* at 202a-03a. And "contrary to the finding of the district court, . . . the Board 'effectively continued in practice the racial assignment of faculty through the 1970-71 school year.' To the extent that the finding of the district court is contrary to the conclusion of this court, it is clearly erroneous." *Id.* at 196a. Moreover, the court of appeals recognized and held that the discriminatory faculty-assignment policy "was inextricably tied to racially motivated student assignment practices" (*id.* at 197a; *see also id.* at 211a), and that the district court erred in failing to attribute any legal significance to the faculty policy "which, at the time of *Brown I*, made it possible to identify a 'black school' in the Dayton system without reference to the racial composition of pupils." *Id.* at 203a.

an all-black student body and an 85% black faculty. App. 11-Ex. (PX 4). The Board altered attendance boundaries so that some of the children in the four blacks-only schools were reassigned to the four surrounding schools with the next highest black pupil populations; and, through either attendance boundary alterations or the creation of optional zones, it reassigned white students from these mixed schools to the next ring of whiter schools. R.I. 1456; App. 274-75, 283-92, 345-46; PX 123.

Thus, the boundaries of the black Garfield and Wogaman schools were retracted, thereby assigning substantial numbers of black children to the immediately adjacent ring of "mixed" schools with the highest percentage of black pupils: Jackson (already 36% black in the 1951-52 school year), Weaver (68% black), Edison (43% black) and Irving (47% black). App. 216-Ex. (PX 100E). As Jackson and Edison were re-zoned to include more black students, their outer boundaries were simultaneously contracted through the creation of "optional zones" (Jackson/Westwood and Edison/Jefferson) so that white residential areas were effectively detached from Jackson and Edison and, for all practical purposes, attached to the next adjacent ring of "whiter" schools. Thus, the Board brought blacks in one end and allowed whites to escape out the other in these "transition" schools. The Board also created optional zones (Willard/Irving, Willard/Whittier and Wogaman/Highview, as well as an option between the new Miami Chapel and Whittier) in white residential areas contained within the boundaries of the original schools for blacks only, so that whites could continue to transfer out of these all-black schools. R.I. 1456; App. 274-75, 283-92. (Prior to 1952 whites had been freely allowed to transfer to "whiter" schools, but such transfers were abolished in 1952. App. 288, 183-Ex. (PX 28).) Optional zones were thus substituted for the prior segregative

free-transfer practice[10] to continue the Board's policy of protecting whites from associating on an equal basis with black students and staff.

During this period the Board also created another optional attendance zone affecting Jackson; this zone was instituted in an area of the Jackson zone containing the Veteran's Administration Hospital, and allowed whites to attend Residence Park, which at that time was all-white. App. 271-73, 216-Ex. (PX 100E). (This option is discussed further at p. 47, *infra*.) Additionally, the Board during this period created an optional zone between Roosevelt (31.5% black) and Colonel White (100% white). App. 275-76, 216-Ex. (PX 100E). The immediate and long-range racial significance of this option are discussed in greater detail at pp. 45-46, *infra*.

Finally, the Board began to transfer black teachers to the formerly "mixed" schools in transition (but *none* to the all-white schools) thereby confirming their identification as schools for blacks rather than whites in the traditional fashion. App. 286, 6-10-Ex. (PX 3).[11]

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[10] The Superintendent's 1954 statement (*see* p. 24, *supra*) included the following: "All elementary schools have definite boundaries and children are obliged to attend the school which serves the area in which they reside. The policy of transfers from one school to another was abolished two years ago when the boundaries of several westside elementary schools were shrunken, permitting a larger number of Negro children to attend mixed schools." App. 183-Ex. (PX 28). Thus, the purpose of free transfers was accomplished by a new device, optional zones, which served the same end of allowing whites to avoid attendance at black or substantially black schools.

[11] *The District Court's Opinion* (Pet. App. 155a-57a). Incredibly, the district court concluded that the West Side reorganization "was an experiment in integration" and, inconsistently, that "[i]ts purpose was to enable black students to go to an integrated rather than an all-black school if they chose to do so." Pet. App. 155a. These conclusions are clearly erroneous, arrived at only through

[11] (Continued)

the most selective and argumentative reading of the record imaginable. For example, the district court cites the testimony from the latest hearing of former Superintendent Wayne Carle in support of the proposition that the West Side reorganization was an "experiment in integration." While Dr. Carle's testimony is not absolutely free of ambiguity (because of his understanding that another superintendent in 1952 and 1954 characterized it as an "experiment in integration" in response to the black community's continuing protest of school segregation (App. 468-70)), taken as a whole it is impossible to characterize his views as being that the events of 1952 were integration-oriented. But the district court selectively relies on five pages of the transcript (App. 468-70) and ignores altogether the very next two pages (App. 471) in which Dr. Carle placed his view in context by emphasizing that "you can't operate part of the system on a segregated basis without signalling that the rest of the system is on a segregated basis" (App. 471); "The action that was taken there was that nothing was done to eliminate the segregation that already existed in the three schools whose boundaries were changed" (*id.*); and that if the Board had *truly* adopted a policy of *real* desegregation and "that were communicated to the community, I suspect it might have a much different effect than minor boundary changes involving schools that remain all black" (App. 472).

These points are unassailable, but by ignoring them the district court had just begun to err. These basic errors were compounded three-fold: First, the court ignored further testimony from Dr. Carle pointing out that a central part of the West-Side reorganization was its use of supportive segregative devices such as assigning black teachers to the schools adjacent to the four blacks-only schools (App. 492), accompanied by the creation of optional attendance zones (App. 492, 494).

Second, the court concluded that "[t]he events of 25 years ago, I suspect, would not affect any student in school at the moment and might not even have affected his parents" (App. 493) (statement of the court). The court's view seems to be that the only harm in segregation occurs at the time of initial imposition, and that subsequent generations have nothing to complain about—a view that is foreclosed by *Brown*.

Third, the court refused to allow Dr. Carle to answer the question, "In light of those two factors [assignment of black teachers and creation of optional zones], Dr. Carle, do you have a view as to the intention of the Board insofar as whether or not there was an intention to establish these [schools adjacent to the blacks-only schools] as the next black schools in Dayton" (App. 494). The court refused to allow the testimony (App. 494-95). Thus, the court relies on the testimony of a witness to support a

[11] (Continued)

conclusion drawn by the court but with respect to which the court would not allow the witness to testify.

The court made other comparable errors in drawing its conclusions about the West-Side reorganization scheme. The court cited the testimony of plaintiffs' expert, Dr. Gordon Foster, for the proposition that the West-Side reorganization was intended as an "experiment in integration . . . to enable black students to go to an integrated rather than an all-black school if they chose to do so." Pet. App. 155a, citing App. 292. This is not an accurate representation of Dr. Foster's testimony, but rather a highly selective reading which distorts both the sum and the substance of the record. For the twenty-five previous pages of transcript, Dr. Foster had detailed, as summarized above (*see* pp. 25-27, *supra*), the large numbers and variety of segregative devices utilized by the Dayton Board in the West-Side reorganization. At App. 292 Dr. Foster concluded this testimony as follows:

> the effect was clearly one of locking in and freezing this configuration including these schools into an all-black school situation.

There can be no mistake as to the objective meaning of this twenty-five pages of testimony, and of Dr. Foster's conclusion, or the objective fact that the Board's actions in this reorganization were intentionally segregative, whatever the Board's *stated* intent. Thereafter, at App. 292-94, the court engaged Dr. Foster in a colloquy ranging from "tipping points" to the "alternatives" to the West-Side reorganization available to the Board. At several points in this colloquy, it is clear that Judge Rubin is not satisfied, for example, when Dr. Foster debunks "tipping points" (App. 293-94), or suggests limited actions which the Board might have taken to show that its actual purpose was at least racial nondiscrimination, rather than segregation, in a difficult situation of a school district with a prior history of segergation and a community undergoing racial change. App. 293. But what apparently peeved the district judge the most was Dr. Foster's evaluation of the ineffectiveness of even such limited alternatives (which the Board, of course, eschewed in its segregative reorganization) in the context of a dual school system (App. 292 and 293):

> The problem, as I see it in this type of situation, is essentially one of diddling around piecemeal with desegregation instead of attacking the problem wholesale and making clear that you are desegregating the entire system.
>
> • • •
>
> I think the only secure solution and the only safe solution is to dissestablish a dual structure in the entire system so that

At the time of this Court's May 17, 1954 decision in *Brown* v. *Board of Education*, therefore, Dayton school officials were operating a racially dual system of public education.[12] This segregation had not been imposed by

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[11] (Continued)

> whites [who may wish to] flee . . . meet the same situation wherever they go.

Viewing Dr. Foster's testimony as a whole, therefore, the district court engaged in much more than just a clearly erroneous selective reading of the record in suggesting that this expert believed the Board's purpose was integrative rather than segregative; it is also a gross misrepresentation, both of Dr. Foster's opinion and the uncontroverted, objective evidence.

The Court of Appeals Opinion. The court of appeals found it unnecessary to specifically address the details of the West Side reorganization. Rather, the Sixth Circuit subsumed most of its disagreement with the district court's purported findings on this score within its conclusion that at the time of *Brown I* "defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the Fourteenth Amendment. Our holding is based upon substantial evidence, much of which is undisputed. The finding of the district court to the contrary is clearly erroneous. . . ." Pet. App. 194a (footnote omitted). The appellate court did, however, specifically address the district court's findings that the use of optional zones—which had their race-oriented origins in the West Side reorganization (theretofore racial separation in "mixed" residential areas had been accomplished through a "free transfer" policy)—had neither racial purpose nor racial effect, and held that these findings were clearly erroneous (Pet. App. 209a-10a); the court of appeals also reversed as clearly erroneous the district court's failure to accord real significance to the Board's overtly unnamed but intentionally segregative school construction policy (*e.g.*, Miami Chapel) which, with the coordinate and explicitly race-based faculty-assignment policy, demonstrably earmarked the West Side schools for the education of black children and the remainder of the system for whites. Pet. App. 195a-96a, 197a, 202a-03a, 211a.

[12] At the remand hearing following *Dayton I*, plaintiffs offered the testimony of a local historian on the facts of school discrimination prior to *Brown* in an attempt to persuade the trial court of these undeniable facts. Instead, Judge Rubin *prohibited* the witness from testifying about the creation of a dual school system prior to 1954. App. 518-19. In its subsequent opinion, the district

[12] (Continued)

court then not only failed to find such a dual system but also misused the obviously startled witness' very limited testimony following the court's surprising ruling. *Compare* Pet. App. 148a and 170a-71a *with* App. 518-22. Petitioners also seek to make more out of this testimony than objective analysis will support. *See* Pet. Br. 30.

We note also that whenever petitioners have the need either to assail the credibility of one of plaintiffs' witnesses, especially those who also happen to be present or former *managing agents of the Board, see, e.g.*, Pet. Br. 35 (referring to two such witnesses as "impassioned advocates for the plaintiffs") and 28 (characterizing the Superintendent of Schools at the time of trial as *plaintiffs'* "chief witness"), or to suggest that this case turns on credibility choices which are shielded from appellate review (*e.g.*, "[m]uch of the testimony was raw opinion testimony of witnesses who had obvious ideological motivations to secure a specific result" (Pet. Br. 39)), they play fast and loose with both the nature of the testimony and the bases of the district court's findings. The district court made no finding, and petitioners can cite to none, which turns on such credibility choices. We note, moreover, that the logic of petitioners' approach would yield the conclusion that all of the witnesses called by the Board were ideological segregationists. Such a rule would be of considerable value to respondents, to the extent we are required to prove subjective racial malevolence.

Petitioners are thus mistaken in their assertion (Pet. Br. 38-39) that the court of appeals has abused the "clearly erroneous" standard of appellate review set out in FED. R. CIV. P. 52(a). *Cf., e.g., Zenith Radio Corp.* v. *Hazeltime Research, Inc.*, 395 U.S. 100, 122 n.18 (1969); *United States* v. *Yellow Cab Co.*, 338 U.S. 338 (1949). Much of the testimony here, especially about pre-*Brown* events but also about the post-*Brown* era, consisted of unchallenged eyewitness accounts, and most of the remaining decisive facts appear in documentary form. *Cf., e.g., United States* v. *General Motors Corp.*, 384 U.S. 127, 142 n.16 (1966); *United States* v. *E. I. DuPont DeNemours & Co.*, 353 U.S. 586, 598 n.28 (1957). The factual questions presented by this case are a mixture of law and fact, or they are questions of ultimate fact of "public law" and constitutional magnitude. *Cf., e.g., Berenyi* v. *Immigration Service*, 385 U.S. 630, 636 (1967); *United States* v. *John J. Felin & Co.*, 334 U.S. 624, 639-40 (1948) (Frankfurter, J.); *Baumgartner* v. *United States*, 322 U.S. 665, 671 (Frankfurter, J.). In the final analysis, we are confident that a review of the *whole* case will cause this Court, as it did the court of appeals, "on the entire evidence [to be] left with the definite and firm conviction that a mistake has been committed [by the district court]." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

state law: indeed, it was operated in open defiance of state law.[13]

D. Continuation of the Dual System After *Brown*.

1. *Faculty and Staff Assignments.*

The Board continued to make faculty and staff assignments in accordance with the racially discriminatory policy announced in 1951 (*see* pp. 23-25, *supra*) at least through the 1970-71 school year. App. 449-50, 453-54, 490-92, 536, 559-68. For example, in the 1968-69 school year, the Board assigned 633 (85%) of the black teachers in the Dayton system to schools 90% or more black in their pupil racial compositions, but only 172 (9%) of the white teachers to such schools. The Board assigned only 72 (9%) of the black teachers to schools which were 90% or more white, but 1,299 (70%) of the white teachers were assigned to such schools. App. 14-Ex. (PX 5D).

Prior to the 1968-69 school year, the Board maintained teacher applications on a racially separate basis. Once

[13] *The District Court's Opinion.* The district court did not specifically speak to this concluding point, but apparently would have reached the clearly erroneous conclusion that the Board was not operating a basically dual system at the time of *Brown*. (In an earlier order of 10 March 1975, entered upon the remand from the court of appeals in *Brinkman I*, 503 F.2d 684 (Pet. App. 32a), the district court ambiguously opined: "We do not deal with a mandated dual school system; we do not deal with actions taken on a school-by-school basis. We do deal with a system that has in the past permitted segregative practices to exist." Pet. App. 77a (footnote omitted). *See also* Pet. App. 75a ("At no time, however, did defendant maintain a dual system of education.")

The Court of Appeals' Opinion (Pet. App. 194a-205a). The court of appeals specifically held that "at the time of *Brown I*, defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment" (Pet. App. 194a); "defendants' segregative practices at the time of *Brown I* infected the entire Dayton public school system." *Id.* at 205a. "The finding of the district court to the contrary is clearly erroneous." *Id.* at 194a.

teachers were hired, their records were kept on various racial bases which were used to segregate teachers and schools. Substitute teacher files were color-coded by race and substitutes assigned on a racially dual basis. And the Board restricted the hiring, transfer, and promotion of black teachers primarily to black or "changing" schools, while white assignments or transfers to these schools were discouraged. App. 94-97, 102-06, 109-11, 117-21, 158-60, 161-63, 164-67, 6-10-Ex. (PX 3). Principals, assistant principals, counselors, coaches and other clerical and classified personnel were assigned on an even more strictly segregated basis. App. 246, 193-Ex. (PX 42); R.I. 814-17, 831-33.

Thus, from at least 1912 through 1968 the assignment of personnel in the Dayton school system fit perfectly the classical mold of state-imposed segregation. Such assignments mirrored the racial composition of student bodies: the Board assigned faculty members to new schools and additions so as to reflect the pupil racial composition at opening, thereby identifying them as "black" or "white" in accordance with the Board's policy (App. 301-02, 381, 11-12-Ex. 17 (PX 4)); and the Board enforced the racial identity of those schools already all-black or all-white by assigning virtually one-race staffs. In the 1963-64 school year, for example, the Board assigned 40 of 43 new full-time black teachers to schools more than 80% black in their racial compositions. App. 13-Ex. (PX 5A). This practice was equally effective in identifying the formerly mixed schools as "changing" or black by assigning more than token black faculty only to these schools and thereafter assigning increasing numbers of black teachers only to these schools. App. 109-14, 178-79, 6-10-Ex. (PX 3). As articulated by Mrs. Greer, a long-time student, teacher and administrator in the system (*see* p. 15, *supra*), the "assignment of staff to go along with the neighborhood change was the

kind of thing that gave the impression of the schools being designed to be black, because black staff increased as black student bodies increased." App. 98. As Board member Leo Lucas put it, race-oriented faculty-assignment practices "manifest the intent of the Board" and have a "spill-over" effect on all aspects of school operation. App. 536.

White teachers similarly were assigned in disproportionate numbers to the predominantly white schools. Thus, for example, in the 1968-69 school year, the Board continued to assign new teachers and make transfers according to the following segregation practice (App. 13-Ex. (PX 5A)):

	Schools with predominantly white student enrollment	*Schools with predominantly black student enrollment*
Black Teachers	40	95
White Teachers	223	64

As the former Superintendent testified, "it is obvious in terms of the new hires and transfers for that year the predominating pattern was the assignment of black teachers to black schools and white teachers to white schools." App. 245.

It was therefore possible at any time during this period to identify a "black" school or a "white" school (and a school in "transition") anywhere in the Dayton system without reference to the racial composition of pupils.

In November of 1968 the United States Department of Health, Education and Welfare [hereinafter, "HEW"] began an investigation of the Dayton public schools to determine whether official policies and practices with respect to race were in compliance with Title VI of the Civil Rights Act of 1964. By letter of 17 March 1969, the acting

Director for the Office of Civil Rights of HEW notified the Dayton Superintendent (and the chief state school officer) that "[a]n analysis of the data obtained during the [compliance] review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff." App. 109-Ex. (PX 11A). Following this determination, the Dayton Board agreed with HEW to desegregate all staff so "that each school staff throughout the district will have a racial composition that reflects the total staff of the district as a whole" (App. 110-Ex. (PX 11F)), in accordance with the principles set forth in *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969). At that time, the Dayton professional staff was approximately 70% white and 30% black; the Board-HEW agreement required complete staff desegregation by September 1971. App. 111-Ex. Nevertheless, by the time of trial in November 1972, it was still possible to identify many schools as "black schools" or "white schools" solely by the racial pattern of staff assignments. [The manner in which the Board's assignment of its professional staff at the high school level, for example, still served to racially identify schools, although less dramatically than prior to the 1971-72 school year, is demonstrated by a table set out in *Brinkman I,* 503 F. 2d at 698 (Pet. App. 57a). Moreover, classified personnel (e.g., secretaries, clerks, custodians and cafeteria workers) continued to be assigned on a racially segregated basis. App. 246a.]

No non-racial explanation for the Board's long history of assigning faculty and staff on a racial basis is possible. School officials, of course, had absolute control over the placement of their employees; consequently, the Board's historic race-oriented assignments of faculty members intentionally earmarked schools as "black" or "white." App.

300-01, 449, 461-62. Nor can the impact of this manifestation of state-imposed segregation on student assignment patterns be minimized. While that effect is not precisely measurable, it is so profound that it could not have been eliminated merely by desegregating faculties and staffs. One of plaintiffs' expert witnesses, Dr. Robert L. Green, Dean of the Urban College and Professor of Educational Psychology at Michigan State University, described how such faculty-assignment practice "facilitates the pattern of segregation" (App. 114) in these terms (App. 107-08):

> When there has been historical practice of placing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentially uni-racial or predominantly black or predominantly white.

See also App. 300-02, 536-38, 559-60. Such racial assignment of staff is also "strong evidence that racial considerations have been permitted to influence the determination of school policies and practices. . . ." *Kelly* v. *Guinn*, 456 F.2d 100, 107 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *see Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 202 (1973); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971).[14]

[14] *The District Court's Opinion* (Pet. App. 151a-54a). The district court conceded that "remnants of the old [explicitly racial] policy [of assigning black teachers only to teach black children], such as discouraging black teachers from going to all-white schools . . . , and assigning black substitute teachers to black

[14] (Continued)

schools . . . , did continue to appear after 1960," but the court argued that "the [1951-52] policy of dynamic gradualism was substantially implemented during the 1950's and 1960's." Pet. App. 152a. This latter conclusion is not clearly erroneous only if it is read as recognizing that the Board's emphasis was on the gradualism, in the words of its 1951-52 policy (*see* p. 24, *supra*) of "not attempt[ing] to force white teachers [into black schools], against their will," and of "introduc[ing] negro [*sic*] teachers, gradually, into [white] schools . . . where there is evidence that such communities are ready to accept [them]." The facts set forth above in text are not disputable, and the district court's effort to set a tone different from those facts is clearly erroneous. The district judge should have adhered to what he observed at trial: "we have abundant testimony the School Board did assign black teachers to black schools and white teachers to white schools. Let me say I am aware of that. May I ask that we now abandon that for evidentiary purposes." App. 302.

Also plainly erroneous is the court's implicit effort to find support for its tone in the fact that "by 1969 the Dayton school system had the most black educators and the second highest percentage (24.4%) of black educators of the twenty largest systems in the State of Ohio." Pet. App. 152a. This argument is specious. In school systems in almost every state which had explicit segregation laws the proportionate number of black teachers was as substantial as in Dayton. And as in Dayton, the "southern" districts also assigned pupils and teachers to schools, in the words of *Brinkman I*, "pursuant to an explicit segregation policy." 503 F.2d at 697. Thus, the presence of a substantial number of black teachers may in some cases be evidence of non-discriminatory hiring; in others, it is the legacy of an explicitly dual system of hiring and assigning teachers on a racial basis, as in Dayton.

Similarly erroneous is the court's finding that "vestiges of the Board's earlier illegal practices were evident until approximately 1963 [,b]ut by 1969 all traces of segregation were virtually eliminated." Pet. App. 153a. *But see* pp. 32-35, *supra*. (Also wrong is the idea that HEW's intervention in 1969 was "edg[ing] the legal limit" (Pet. App. 153a): first, HEW's action was clearly within the bounds of settled precedent, *United States* v. *Montgomery County Bd. of Educ.*, *supra*, except that most districts at that time were allowed only one year, rather than the two HEW allowed Dayton, to totally eliminate *de jure* faculty segregation practices, *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211, 1217-18 (5th Cir.) (*en banc*), *rev'd on other grounds sub nom. Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970) (as former Superintendent Carle pointed out, HEW acquiesced in the Board's desire to delay complete faculty

2. *School Construction, Closing and Site Selection.*

The Board's school-construction, school-closing and site-selection policies and practices over the past two decades did nothing to alleviate, or even to cease taking segregative

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[14] (Continued)

desegregation over a two-year period, App. 492); second, the court's view is not credible to anyone, including the courts, familiar with HEW's previously adjudicated unwillingness to fulfill its Title VI obligations, *see* p. 60, *infra*.)

Finally, the court committed a fundamental error of both logic and fact in failing to recognize the obvious relevance of the Board's race-based faculty policies to the question of the Board's segregative intent with respect to other areas of school administration affecting pupil attendance patterns. Thus, the court's argument that faculty segregation had no impact because in each instance "the school was already identifiable as being black because of the racial composition of the students" (Pet. App. 153a), is factually untrue. For example, in 1962 when the Board converted the old Dunbar into McFarlane elementary and opened the new Dunbar High School, virtually all-black faculties and virtually all-black student bodies were *simultaneously* assigned to these schools; the same is true of the racial assignments of staff to all of the new one-race schools and additions. *See* pp. 39-41, *infra*. Faculty- and student-assignment practices operate hand-in-glove, a point so obvious it is difficult to understand how the district court missed it. The court compounded its factual error by failing to give faculty-segregation practices their due weight of "hav[ing] the clear effect of earmarking schools according to their racial composition." *Keyes*, 413 U.S. at 202. *See, e.g.*, pp. 32-36, *supra*. This "clear effect" may not be quantifiable with mathematical precision, but it is substantial in any realistic sense.

The Court of Appeals' Opinion (Pet. App. 196a, 206a-07a). The court of appeals reiterated its *Brinkman I* finding that the Board "effectively continued in practice the racial assignment of faculty through the 1970-71 school year," and held that "[t]he finding of the district court to the contrary is clearly erroneous." Pet. App. 206a (footnotes omitted). *See also* note 9, supra. The court of appeals further held (Pet. App. 206a):

> The district court also erred in failing to attribute the correct legal significance to the persistently discriminatory faculty assignment practices as a component of the Board's perpetuation of the dual system extant at the time of *Brown I*.

See also Pet. App. 207a, 211a.

advantage of, the condition of state-imposed segregation extant at the time of *Brown*. To the contrary, the Board's policies and practices in these areas intentionally impacted the dual system and literally sealed it in. In the period of expansion of the school system from the late 1940's to the mid-1960's, the overwhelming majority of new schools and additions to schools were located by the Board in either virtually all-black or virtually all-white areas, and attendance boundaries were drawn or maintained so that new schools and expansions of existing facilities opened as virtually one-race schools. App. 258-63, 304, 556-59. Of 24 new schools constructed between 1950 and the time of trial, 22 opened 90% or more black or 90% or more white. App. 258, 11-Ex. (PX 4). During the same expansion period, additions to existing facilities followed the same pattern. Seventy-eight of some 87 additions of regular classroom space, for which racial compositions are known, were made to schools 90% or more one race at the time of the expansion; only nine additions were made to schools less than 90% black or white. App. 304. The race-based nature of these practices is made crystal clear by the coordinate assignment, pursuant to the Board's "policy" (*see* App. 381), of professional staffs to these schools and additions tailored to their intended racial identities. App. 301-02, 378-79, S.Ct.A.316-381, 460-62, 11-12-Ex. (PX 4).

Plaintiffs' expert, Dr. Gordon Foster, testified that such school construction patterns "by and large . . . took the place of changing zone lines in terms of maintaining existing racial patterns and compacting them." App. 347. Mr. Bagwell, the Dayton Board's chief rebuttal witness with respect to school construction, admitted that "in effect then, when you . . . put an addition to a school, that as far as that space is concerned, you determine the boundaries and they are coextensive with the original boun-

daries of the school. . . . So that if a school is already 100 percent black and you are making an addition to that school, you in effect have determined the boundaries to be . . . creating a hundred percent black school unit." App. 381. The same is true with respect to the virtually all-white or all-black primary units. App. 269-70, 555-56. And the placement of portable classrooms also operated in a pattern that reflected the basic dual structure of the system. App. 266-68.

An example will illustrate the similar racial underpinnings of the more complex process of locating and constructing new schools. In 1962, the Willard and Garfield schools (previously designated for blacks only) were closed, and the old blacks-only Dunbar high school building was converted into McFarlane elementary. Most of the children from the Willard and Garfield attendance areas were simply reassigned to the McFarlane school which opened, certainly to no one's surprise, with an all-black pupil population and an all-black faculty. Some children from the Willard and Garfield areas were also assigned to the all-black Irving and Miami Chapel elementary schools. At the same time, a newly constructed Dunbar high school, located in a black neighborhood at the farthest corner of the school district away from substantial white residential areas, opened with a virtually all-black student body and faculty. App. 265, 296-97, 523-24, 526, 531-34, 556-58, 5-Ex. (PX 2E), 11-Ex. (PX 4), 218-Ex. (PX 130C), 6-Ex. (PX 3). Thus, a major new element was added to the dual system and, although there was some juggling within, the color line was expanded and reinforced.

As discussed at pp. 49-50, *infra*, immediately prior to these racial events, the Board had additional opportunity to locate three other new high schools and draw attendance

lines that would work toward dismantling the basically dual pupil assignment pattern at the high school level. Instead, in conjunction with optional zones, the drawing of attendance lines and the coordinate assignment of faculty, the Board also converted Roosevelt into a blacks-only school and opened two new virtually all-white high schools and a "mixed" school.[15]

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[15] As Dr. Foster testified, this systematic pattern of one-race construction for new schools and additions "has managed to lock-in and compact both the school population and the residential population in the inner city, and at the same time to promote housing segregation and school segregation in the far-flung suburbs" of the Dayton school district. App. 260. *See also* App. 269-70, where Dr. Foster describes the pattern of constructing one-race schools and additions in Dayton as basically that of "locked-in black schools," with white schools "in the area of the white suburban expansions which are farthest" from the black areas:

> I think the [Supreme] Court's language for this, which even lay people can understand, was something like, as I remember, a loaded game board. . . .

It is precisely this "loaded game board" (*see Swann*, 402 U.S. at 28; *id.* at 20-21) that petitioners overlook when they cite (Pet. Br. 35-37) the testimony of these witnesses as showing that everyone agrees that the Board had no alternative to its segregative site-selection practices, and that residential segregation would have caused the same result no matter what the Board did short of busing pupils for desegregative purposes. But the very heavy hand the Board played in facilitating, influencing and incorporating the basic dual foundation, resulting in "locked-in" one-race schools, precludes the Board from arguing that "the congruency of housing and school boundaries [was] inevitable." *United States v. Board of School Comm'rs*, 474 F.2d 81, 86 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973). The Board's segregative role in this regard is illustrated by the testimony of one of the witnesses relied upon by the Board. This witness observed that when the new Dunbar high school opened in 1962, "there were no houses there [in the vicinity of the new school] then, very few. . . . The school was there and the people went where the school was." App. 528. "And then a lot of housing developments came in there later and it all became more and more segregated because Dunbar High School was there." App. 526. Moreover, feasible non-segregative alternatives repeatedly presented themselves, but the Board persistently closed its eyes to such options. *See, e.g.*, pp. 49-51, *infra; see also* Argument, pp. 114-19, *infra.*

A final example, presenting the converse of the above examples, relates to the Board's failure to utilize excess capacity to the maximum efficiency as pupil populations declined by over 10,000 following their peak year in the mid-1960's. Even conservative estimates at the time of trial indicated that the Board could have closed down 9 or 10 average-size elementary schools. App. 263-65, 197-206-Ex. (PX 56). Such closings would have presented the Board with substantial opportunities to accomplish significant savings in costs, and at the same time accomplish substantial desegregation. (There would be substantial cost savings with respect to such closings, even if substantial pupil transportation were required to accomplish school desegregation conveniently and safely for the children. According to the Board, the average yearly per pupil transportation cost on Board-owned buses is $50.00, while the average yearly per pupil cost for simply maintaining a pupil space in a school is $140.00. App. 61, 72, 77 (admissions 33 & 33A).) But rather than closing selected black and white schools and reassigning pupils to accomplish actual desegregation, the Board elected the more costly segregative option of keeping these under-utilized schools open and maintaining their racial identity.[16]

[16] *The District Court's Opinion* (Pet. App. 169a-71a, 173a-80a). The district court acknowledged the segregative pattern of the Board's school construction/site-selection practices (Pet. App. 173a), which from an administrative perspective "approached the level of haphazard in some instances." *Id.* The court concluded, however, that plaintiffs had not shown that the Board's practices of "site selection, construction of additions, use of portables, or school utilization had a segregative purpose or that such policy had an incremental segregative effect upon minority pupils, teachers, or staff." *Id.* at 180a. With respect to the question of segregative intent, the court's conclusion is unsupportable. The court is able to arrive at this conclusion with a straight face only by treating these practices in a context completely removed from the Board's systematic pre-*Brown* practices of building and converting schools for black students and black teachers only, by not recognizing how much the post-*Brown* patterns of faculty assignments to new schools bespoke unmitigated segregative intent, and further by avoiding the obvious facts, such as the construction of the new Dunbar (and the interrelated closing of Willard and Garfield, and conversion of the old Dunbar into McFarlane), which are inexplicable except in terms of race. In this more complete context (a context with which the court studiously refused to deal), the finding of no segregative intent is clearly erroneous. Even more astounding is the court's conclusion that none of these practices had segregative effect. This conclusion is contrary to the court's own subsidiary findings (*e.g.*, *id.* at 173a), and contrary to sound reason. Given the opinion's repeated conclusions that nothing the Board did had a segregative effect, a stranger to the district court's conduct in this case would no doubt be puzzled, if not flabbergasted, as to why the Dayton schools were almost totally segregated at the time of trial.

The Court of Appeals' Opinion (Pet. App. 207a, 210a-12a). The court of appeals held that the trial court's conclusion that the Board's construction, site-selection and related practices were not infected with segregative intent was clearly erroneous. Pet. App. 211a. The appellate court noted the near-total segregative pattern of new school construction and additions to existing schools, "[c]oupled with . . . the coordinate racial assignment of professional staffs to . . . these schools and additions on the basis of the racial composition of the pupils served by the schools" (*id.* at 210a), which "unmistakeably increased or maintained racial isolation." *Id.* at 211a. The court of appeals concluded, moreover, that "the post-*Brown I* practices of racially motivated faculty assignments to new schools bespeaks a concomitant segregative intent in the location of new schools and additions." *Id.* The court also found clearly erroneous the trial court's finding that these practices also had no segregative effect (*id.* at 211a-12a); the appeals court correctly concluded that "defendants pursued a policy of containment through school construction and site selection practices." *Id.* at 212a.

With respect to the circumstances surrounding the construction of the new Dunbar high school and conversion of the old Dunbar into McFarlane elementary (whose attendance zone was drawn to take in most of the students from the blacks-only Willard and Garfield schools, which were simultaneously closed), the court of appeals arrived at the unassailably "reasonable presumption that the simultaneous assignment of both a predominantly black faculty and student body at these schools was the product of segregative intent and an effort to perpetuate the dual system extant at the time of *Brown I*." *Id.* at 207a.

3. *Optional Zones and Attendance Boundaries.*

We have already shown how the Dayton Board utilized optional zones and attendance boundary manipulation as

segregative devices in connection with the 1952 West-Side reorganizations (*see* pp. 25-27, *supra*). There are additional examples of both practices which stand on their own as segregation techniques.

Optional zones are dual or overlapping zones which allow a child, in theory, a choice of attendance between two or more schools. App. 257. Yet, the criteria stated by the Board for the creation of both attendance boundaries and optional zones are precisely the same: they constitute merely a type of boundary decision and serve no other educational or administrative purpose. App. 250, 320-21. Optional zones have existed throughout the Dayton school district and apparently have been created whenever the Board is under community pressure which favors or disfavors attendance at a particular school. App. 280-81, 393-95, 401-03. Other than for such purely "political" reasons, there is no rationale which supports the establishment of an optional zone rather than the creation of an attendance boundary, which is a more predictable pupil-assignment device (App. 321); and, as the district court found in its first opinion, optional zones "destroy or dilute" the so-called "neighborhood school concept." Pet. App. 12a-13a.

In many instances in Dayton optional zones were created for clear racial reasons, as, for example, in the West-Side reorganization. From 1950 to the time of trial, optional zones existed, at one time or another, between pairs of schools of substantially disproportionate racial compositions in some fifteen instances directly effecting segregation at some 21 schools. The West-Side reorganization in 1952 (*see* p. 26, *supra*) involved six optional areas with racial implications: Willard-Irving, Jackson-Westwood, Willard-Whittier, Miami Chapel-Whittier, Wogaman-Highview, and Edison-Jefferson. App. 274-75, 283-92. Other optional zones with demonstrable racial significance at

some time during their existence include the following: Three optional zones between Roosevelt and the combination Fairview-White; two optional zones between Residence Park and Adams; and optional zones between Westwood and Gardendale, Colonel White and Kiser, Fairview and Roth, Irving and Emerson, Jefferson and Brown, and Jefferson and Cornell Heights. App. 274-82, 323-24; PX 47-51 (maps and overlays).

In addition, at the high school level, Dunbar remained in effect a systemwide optional zone for blacks only through 1962 when it was converted into an all-black elementary school (App. 296-97) (*see* p. 40, *supra*); and Patterson Co-op remained a city-wide and, through the 1967 school year, virtually all-white optional attendance zone. The city-wide Patterson Co-op operated in a more subtle segregative fashion than did Dunbar. In 1951-52, Patterson had no black students and no black teachers (App. 217-Ex. (PX 130B)); by 1963 its student body and faculty were only 2% black (App. 218-Ex. (PX 130C)); and by 1968 the pupil population rose to 18.3% black and the faculty to 3.5% black. App. 219-Ex. (PX 130D). Students were admitted to Patterson through a special process involving coordinators and counselors, none of whom were black prior to 1968. App. 357-58. Patterson has over the years (even after 1967 through the time of trial) served as an escape school for white students residing in identifiably black or "changing" high school attendance zones, particularly Roth and Roosevelt. App. 187-88. In conjunction with the attendance-area high schools, these two special high schools operated as city-wide dual-overlapping zones contributing to the pattern of racially dual schools at the high school level throughout the district. *See* App. 296-97, 187-88.

Actual statistics on the choices made by parents and children in four optional areas are available. In each in-

stance the option operated in the past, and in three instances at the time of trial, to allow whites to transfer to a "whiter" school. For example, in the Roosevelt-Colonel White optional area (which was carved out of Roosevelt originally about 1951-52 when the Board was creating optional areas as a substitute for free transfers between various West-Side elementary schools (*see* pp. 26-27, *supra*)), from the 1959-60 school year through the 1963-64 school year a cumulative total of 1,134 white but only 21 black students attended Colonel White. App. 158-Ex. (PX 15A1). Testimony from a Dayton school administrator indicates that from 1957 through 1961, although this optional area was predominantly white, black students who lived in the area attended Roosevelt which had become virtually all-black (Colonel White was 1% black). App. 169-71; R.I. 797-802, 831-33. The Roosevelt yearbook for 1962 shows that only three white seniors from the optional area attended the black high school. App. 156-57-Ex. (PX 15A). As Mrs. Greer testified, this optional area did "an excellent job of siphoning off white students that were at Roosevelt." App. 98.

At the November 1977 hearing the Board presented a witness who had conducted a statistical analysis of this optional area and argued that it was having an integrative effect by 1970 because blacks in the zone were attending Colonel White. App. 505-07. This witness conceded, however, that he was only looking at the effect on the "white" school (Colonel White) and not the "black" school (Roosevelt); the true picture, therefore, was that in 1970 317 white students used the optional zone to avoid attending Roosevelt, which was thereby made 100% black rather than the 87% black it would have been without the racial option. App. 507-10, 515-17. This impact, of course, was in accord with the historic purpose and function of optional zones in Dayton to allow whites to avoid black in favor of "whiter" schools.

As another example, the Colonel White-Kiser option acquired its racial implications after its creation in 1962 with the racial transition of the Colonel White school. At its inception and for several years thereafter, when both schools were virtually all-white, most children in the White-Kiser option area chose White. As Colonel White began to acquire more black students, whites chose Kiser more often until in the 1971-72 school year, no white children chose the 46% black Colonel White school, while 20 chose the 6% black Kiser school. App. 159-Ex. (PX 15B1), 275-76-Ex. (DX AI (b)). The Veterans Administration optional area between Residence Park and Jackson operated in a similar way. App. 315-Ex. (DX CO), App. 317-Ex. (DX CP). Petitioners' exhibits show that from 1957 through 1963 no children from the former V.A. optional area attended Jackson, while 32 whites (and 8 blacks) attended Residence Park. In the 1957-58 school year, Residence Park was basically white and Jackson was black. App. 101, 271-73. (By 1963, however, Residence Park had become 80% black. App. 218-Ex. (PX 130C).)

Although by the time of trial many of these still-existing optional zones had already exhausted their segregative purpose of allowing whites to leave predominantly black or "changing" schools to which they would otherwise have been assigned, over the long term they clearly contributed substantially to, and facilitated, school segregation.[17] Moreover,

[17] When petitioners say that "the undisputed evidence is that racial considerations never played a role in the establishment of optional zone attendance boundaries in the Dayton system [citing App. 391, where one of the Board's managing agents says that race never played a role]" (Pet. Br. 34), they either grossly mis-state the case, or they mean that respondents were unable to produce evidence of subjective racial motive on the part of responsible school officials. For the facts set out in text—"optional zones" employed for "political" purposes, without justification in accepted principles of educational administration, in defiance of claimed "neighborhood school" postulates, and with frequent clear racially

even by the time of trial several of these optional areas continued to permit whites to escape to "whiter" schools, thereby further impacting the black schools and precipitating additional instability and transition in residential areas. From 1968 through 1971 when Roosevelt was a 100% black school, for example, 375 white children from the Roosevelt-Colonel White optional area attended Colonel White. App. 158-Ex. (PX 15A1). Throughout its life, then, this option has allowed very substantial numbers of white children to avoid attending Roosevelt. By 1968, however, and not atypically, the optional area had undergone significant racial change and substantial numbers of black children were also attending Colonel White. App. 156-57-Ex. (PX 15A), 158-Ex. (PX 15A1). Plaintiffs' expert, Dr. Foster, explained how optional attendance areas facilitate both educational and racial segregation:

> [T]he short term effect . . . is to allow whites to move out of a school assignment that is becoming black. . . . [App. 282].
>
> [G]enerally where you have an optional zone which has racial implications, you have an unstable situation that

segregative impact—certainly create a "dispute," standing alone, as to whether segregative intent was at work. When it is recalled that "optional zones" in Dayton originated in the early 1950's as the offspring of the prior free-transfer policy which was a patent segregation device, and that such zones were the key to converting more of the West Side schools into black schools, the only reason that a "dispute" exists is because of petitioners' refusal to face the plain facts. When these facts are then placed in the context of a system that was methodically practicing racial discrimination in virtually all other areas of school administration, the conclusion that "optional attendance zones" were regularly predicated upon segregative intent is put beyond doubt, if not beyond "dispute." With great frequency, optional zones in Dayton were pure racial gerrymanders. *Cf. Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). The fact that such machinations sometimes had no racial implications can mean no more, on this record, than that the Board also found them adaptable to non-racial "political" purposes.

> everyone realizes is in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation. . . . [T]hese [optional areas in Dayton] accelerated and precipitated further segregation. . . . [App. 281].

Formal attendance boundaries, in conjunction with optional zones, have also operated in a segregative fashion; and in some instances firm boundaries were also drawn along racial lines. An example is the boundary separating Roth and Roosevelt which was drawn in 1959. Roth took almost all the white residential areas on the far west side of Dayton from Roosevelt. At its opening, Roth had only 662 pupils, while Roosevelt's enrollment dropped by 602. Coupled with the exodus of whites out of Roosevelt through the Colonel White-Roosevelt optional areas, almost all whites were thereby transferred out of Roosevelt by Board action, in short order converting Roosevelt into a virtually all-black school. App. 295, 348; PX 48 & 46. (And, of course, the designation of Roosevelt as a black school was evidenced in the traditional way, by assigning ever-increasing numbers of black teachers to the school. App. 9-Ex. (PX 3).)[18]

[18] Petitioners point (Pet. Br. 24, 28) to a small handful of actions, including the construction of Roth, taken over the long course of this record which they argue is proof of their "intent to improve racial mix while preserving the concept of neighborhood schools. . . ." Pet. Br. 28. The notion that the location of Roth was based on integrative intent was refuted by petitioners' own witness on the subject, who said that race was not considered at all. App. 389. Petitioners' argument about Roth also ignores the fact, shown in text, that the Roth attendance boundary was drawn in such a way as to remove nearly all of the white students from Roosevelt, thereby markedly hastening its conversion into a black school. (*See also* the alternatives discussed in the next paragraph in text.) Petitioners' other three actions claimed to have been based on "intent to improve racial mix"—the 1952 West Side reorganization (of all things), the 1967 location of the Jefferson primary unit, and the 1969 revision of the Stivers high school boundaries (Pet.

Another high school under construction at the same time as Roth, Meadowdale, opened in 1960, but as an all-white school with an all-white staff. App. 11-Ex. (PX 4). Opportunities were available for the placement of such high schools and use of the excess capacity or the redrawing of the boundaries of Roth, Roosevelt, Stivers, Fairview and Meadowdale in order to accomplish desegregation. But school authorities selected the alternatives that continued rather than alleviated the extreme racial segregation at the high school level. App. 269, 295, 348-49; PX 6. This pattern was capped in 1962 when a new Dunbar high school opened with a virtually all-black faculty and a defined attendance zone that produced a virtually all-black student body. At the same time the Board converted the old Dunbar high school building into an elementary school (renamed McFarlane), whose newly-created attendance zone took in most of the students in the zones for the all-black Willard and Garfield schools, which were closed. *See* p. 40, *supra*.

In still other instances, firm attendance boundaries have not been enforced for white children when assigned to black schools. For example, a pupil locator map made to assist in developing a middle school plan in the 1970-71 school year showed that many white children assigned by their attendance zone to the black schools actually attended the predominantly white schools located on the other side of Wolf Creek. App. 210. A similar situation existed in the Residence Park-Jackson area. *See* p. 47, *supra*.

Finally, the Board also persistently refused to redraw boundaries between, or pair, contiguous sets of schools

Br. 28)—are of a similar quality. But these are minor skirmishes, designed to focus attention away from the overpowering record evidence of intentional segregation. Petitioners' counsel properly described them as "isolated incidents" (App. 390), at best; even if petitioners' version of these events could be accepted, they pale out of existence in the light of the whole record.

which had been, and were at the time of trial, substantially disproportionate in their racial compositions. Examples of such contiguous pairs include Drexel (8% black) and Jane Adams (79% black); McGuffey (42% black) and Webster (1% black) or Allen (1% black); Irving (99% black) and Emerson (9% black); Whittier (99% black) and Patterson (0% black). PX 68, 62. Such alternatives to segregation—many of which were recommended by subordinate school administrators and even the Ohio State Department of Education (App. 131-32, 113-4-9 Ex. (PX 12))—were rejected by the Board.[19]

[19] *The District Court's Opinion* (Pet. App. 155a, 159a, 162a-69a, 170a, 174a). The court's unsupported summary conclusion that "[n]o evidence has been presented suggesting that attendance zones were redrawn to promote segregation" (Pet. App. 155a), is clearly erroneous, as the evidence set forth above demonstrates. Examples of similar errors include the conclusion that no segregative intent was involved in the redrawing of Dunbar's high school zone in 1962, as well as the boundary changes attendant upon conversion of the old Dunbar into McFarlane elementary. Pet. App. 159a. Viewed in their historical context (which of course the district court does not do), there is no alternative but to conclude that these changes were carried out with segregative intent. Similar clear error occurred with respect to the court's evaluation of the Roosevelt boundary change which accompanied the 1959 opening of Roth high school (Pet. App. 174a), as demonstrated by the factual discussion at p. 49, and n.18, *supra*.

The court's conclusions that optional zones, including the city-wide high school options, had neither segregative intent nor effect (Pet. App. 162a-69a), also are clearly erroneous. Here as elsewhere the courts commits threshold error in not analyzing the optional zones in light of their genesis in the early 1950's when they were deliberately initiated for demonstrably segregative ends. *See* pp. 26-27, and n.11, *supra*. In proper context, therefore, many optional zones in the Dayton district were instituted for racial reasons, and over time they had a significant racial impact which preserved, perpetuated and exacerbated intentionally-imposed systemwide segregation. The court's contrary conclusions are manifestly erroneous.

[Optional or dual overlapping zones were the mainstay of the "southern" style of dualism. *See Green*, 391 U.S. at 432. Such options are a classical segregation device which the courts have found prevalent in the "northern" cases as well. *See, e.g., United*

4. *Grade Structure and Reorganization.*

As previously noted, the Board persistently refused to alter grade structures by pairing schools to accomplish pupil desegregation. *See* pp. 50-51, *supra*. Likewise, the different grade structures involved in the construction of primary units, and the various grade organizations of the Dunbar high school (and Willard and Garfield prior to 1962) have perpetuated and compounded school segregation. *See* pp. 17-19, 40, *supra*.

The Board acted in similar fashion in the 1971-72 school year when it reorganized the grade structures of some 20 elementary schools from K-8 to K-5, 6-8. This grade reorganization program presented an important opportunity for the Board to accomplish substantial desegregation by judicious selection of sites, alterations of feeder patterns, and the establishment of the new attendance zones for both the middle (6-8) and elementary schools (K-5) affected. App. 70-81-Ex. (PX 10). Yet, in the face of recommendations from the State Department of Education of alternatives for accomplishing substantial desegregation, and the development of a pupil locator map so that there could be

States v. *School District of Omaha*, 521 F.2d 520, 540-43 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975), and cases cited; *Bradley* v. *Milliken*, 484 F.2d 215, 232-35 (6th Cir. 1973), and cases cited. Judge Wisdom has correctly described this device as "unadulterated segregation." *United States* v. *Texas Educ. Agency*, 457 F.2d 848, 867 (5th Cir. 1972) (*en banc*).]

The Court of Appeals' Opinion (Pet. App. 209a-10a). The court of appeals rejected as clearly erroneous (Pet. App. 210a) the district court's conclusory finding that "[n]o evidence has been presented suggesting that attendance zones were redrawn to promote segregation," and the appellate court specifically found that the Board had used "optional attendance zones" for racially discriminatory purposes in clear violation of the Equal Protection Clause." Pet. App. 209a (footnote omitted). The factual details set out above compel the conclusion reached by the court of appeals.

no doubt about the racial impact of its actions, the Board implemented a plan which reimposed segregation at three middle schools and their feeder elementaries, increased racial segregation at another middle school, and accomplished some desegregation at the fifth middle school. App. 147-48-Ex. (PX 12). The Board's actions thus resulted in "increasing or maintaining segregation as opposed to availing the opportunity of decreasing it." App. 303. The Ohio State Department of Education was of a similar view; it notified Dayton school authorities that the middle school reorganization program "has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to school children." App. 148-Ex. (PX 12).[20]

5. *Pupil Transfers and Transportation.*

Prior to the West-Side reorganization in 1952 (*see* pp. 25-27, *supra*), the Dayton Board regularly transferred (and provided transportation where necessary to) white children from the attendance areas of black schools, past or away from other all-black schools to "whiter" schools.

[20] *The District Court's Opinion* (Pet. App. 157a-58a). The district court concluded that the grade-structure reorganization accompanying the creation in 1971 of five middle schools was not a result of segregative intent. This conclusion might not be clearly erroneous if the facts had arisen in a school system with no history of intentional segregation. But these events occurred in Dayton, and even the Ohio State Department of Education could not avoid the conclusion that the Board was up to its same old segregative tricks. The district court's contrary finding is clearly erroneous.

The Court of Appeals' Opinion (Pet. App. 212a-13a). The court of appeals characterized the district court's finding as "questionable in light of plaintiffs' convincing demonstration that the natural, probable, and foreseeable result of the establishment of the middle schools was an increase or perpetuation of segregation" (Pet. App. 213a), and held that the trial court erred in "fail[ing] to recognize the middle school system as one of the areas in which defendants failed to disestablish Dayton's dual school system." *Id.*

App. 412-13. Thereafter, the Board utilized optional zones to provide white children with an equally effective means of transferring out of the core black schools to "whiter" schools. *See* pp. 26-27, *supra.* And the city-wide Dunbar and Patterson Co-op high schools operated in similar fashion. *See* p. 45, *supra.*

In addition, curriculum, hardship and disciplinary transfers have functioned in many instances to allow white children to avoid attendance at identifiable black schools as well as to channel black students away from white schools. App. 171-73, 153; R.I. 799-800, 819-22. These practices reinforced the racial identification of the schools. Two prime examples are the use of curriculum transfers by white students under the Board's Freedom of Enrollment plan (App. 153-54, 171-73), and the emergency transfers of students in 1969 involving the Roth and Stivers high schools. App. 299, 164-65-Ex., 169-Ex. (unmarked exhibits). This latter incident takes on additional significance because it occurred in connection with the only time prior to trial that the Board redrew an attendance boundary to accomplish desegregation. This was accomplished by adding some of the all-black Roosevelt and Dunbar attendance areas to the predominantly white Stivers high school. App. 218-20. In the very first year following this realignment, disciplinary problems at Stivers, as well as at the predominantly black Roth, led to the transfer of 34 black students out of Stivers to the all-black Dunbar or Roosevelt schools, and 36 white students out of Roth to the virtually all-white Meadowdale, Stivers, Kiser and Fairview high schools. None of the white children transferred were assigned to black schools; and none of the black children transferred were assigned to white schools. App. 219-25.

Overall, hardship, emergency and special education transfers were also carried out in such a way as to reflect and reinforce the underlying racial duality in pupil assignments. App. 299. During the 1972-73 school year, for example, 266 (or 70%) of the 377 black children transferred were assigned to black schools, and 155 (or 91%) of the 171 white children transferred were assigned to white schools. App. 174-75-Ex. (PX 16F).

Throughout the post-*Brown* period, non-resident pupils attending the Dayton system on a tuition basis were assigned in a similar racially dual fashion: white pupils were assigned to white schools (App. 211-12), and black pupils were assigned to black schools. App. 126-27. The assignment practices relating to several hundred white high school pupils from Mad River Township, who attended the Dayton system on a tuition basis throughout the 1950's, is illustrative. These students were assigned to the virtually all-white Stivers, Kiser, Wilbur Wright, and Belmont high schools. When the Board felt there might be capacity problems at the schools, the Board did not consider assigning these non-resident pupils to the black Dunbar, Roosevelt or Roth high schools, which had ample space. Instead, the Board notified the Mad River Township school district that space would be unavailable for these tuition pupils in the 1960's. App. 211-13, 409-11, 170-Ex. (unmarked exhibit). In all of the various forms of pupil reassignment, it was the unbroken practice of the Board *never* to reassign white pupils to identifiably black schools. App. 212.

An additional, classical segregation technique utilized by the Dayton Board was "intact" busing. There are two examples. First, in 1963 white children from the Ruskin school were transported as a segregated unit (*i.e.*, teacher and class as a unit) into separate one-race classes at the

racially mixed Central school. App. 129-30. The second instances occurred in 1968 when the black Edison school was partially destroyed by fire. These black children were transported to a number of white schools throughout the city. But they remained as segregated as if they had been transferred to all-black schools, because they were accommodated in the white transferee schools in racially segregated classes. App. 128-29, 188-89.

Significantly, intact busing was not the Board's first alternative with respect to reassigning the Edison children. As Assistant Superintendent Harewood, the first black in the Board's central administration, recounted the incident, the first proposal under consideration was to house these black children in neighborhood churches. This proposal was abandoned only under pressure from Mr. Harewood, who pointed out that there were vacant classrooms in other schools in the city. Then, without further consultation with Mr. Harewood, the decision was made to transport self-contained black units into the white schools. App. 128-29. The next fall, the new Superintendent of Schools ordered that the "intact" aspect of these reassignments be terminated. Upon later examination, however, he found that the black children were still being segregated within the white schools under somewhat more subtle "tracking" procedures, and he again ordered that the children be fully integrated. App. 189. Thus, only through pressure from a new Superintendent and from Mr. Harewood was the "intact" brand of racial discrimination terminated, and the Edison children integrated into the white schools to which they had been reassigned.

Also at this time, predominantly black groups of children from the overcrowded Jefferson school were assigned by non-contiguous zoning to a number of white schools. R.I. 848-50; PX 122. These small amounts of actual, al-

though only one-way, desegregation were short-lived, however. Instead of expanding the use of these desegregative alternatives, the Edison and Jefferson reassignments were terminated for the 1971-72 school year and the black children were resegregated into the rebuilt black Edison school (and by then, the black McFarlane middle school), and the black Jefferson school. App. 208. The segregative effect of these reassignments is shown by the following chart comparing the percentage of blacks in the receiving white schools (*see* PX 122) in the 1970-71 school year to that existing in the 1971-72 school year:

	% Black 1970-71	% Black 1971-72
Ft. McKinley	9.6	1.6
Loos	9.5	6.0
Horace Mann	11.1	0.7
Shiloh	7.4	0.9
Shoup Mill	13.9	1.4
Valerie	20.0	13.5

Thus, for several decades Dayton school authorities have transported children for a variety of reasons. But, with only a few hard-fought exceptions, children have never been transported in such a fashion as to accomplish desegregation; with singular consistency, the Dayton Board's transportation practices have maintained, reinforced and/or exacerbated racial segregation. [Although transportation has been used only twice (*see* p. 54, *supra*) for desegregation purposes, pupil transportation has not been an uncommon event in Dayton. For many years white children in the far northwest, northeast and southeast areas of the system were transported to white schools in those areas (App. 196); and, of course, black orphan children were transported all the way across town to the

all-black Garfield school (*see* p. 16, *supra*). (Ohio law requires that local school authorities make transportation available, and the Dayton Board so acts, for students who are assigned to schools beyond a prescribed distance from home. App. 193, 196, 414.)]

Finally, the Board's Freedom of Enrollment policy, adopted in 1969, as it existed at the time of trial was, at best, a washout as a desegregative technique. Under this policy, students residing in an attendance area were given first priority to attend that school; second priority was given to students requesting transfer to a school for a specially available course; and the third priority was given to children requesting transfers and whose enrollment would improve the racial balance in the receiving school. App. 161-62-Ex. (PX 16B). The first priority merely froze in the pattern of segregation which began two-thirds of a century ago. The second priority actually contributed to school segregation because it was used by whites to transfer from black schools to white schools. *E.g.*, App. 153-54. (In the 1972-73 school year, for example, 22 of 23 white students transferring under the Freedom of Enrollment policy were transferred to white schools. App. 173-Ex. (PX 16D).) Under the third priority, 459 black children transferred in the 1972-73 school year to white schools, thereby accomplishing some actual desegregation; but only one white child, formerly in a parochial school matriculating into a 54.3% black high school, made a racial balance transfer. App. 173-Ex. (PX 16D), 299. Hence, transfers under the Freedom of Enrollment policy were exclusively one-way—i.e., some blacks and some whites transferring to white schools—and had a negligible if not retrogressive impact on the racially dual pattern of pupil attendance. As the Superintendent testified, "the pattern . . . has been pervasive down through the years, that no white students,

regardless of from where they came, or the purpose, were assigned to black schools." App. 212.[21]

6. *The Board's Rescission of Its Affirmative Duty.*

As reflected in the foregoing pages, black citizens of Dayton had long been thwarted in their attempts to end state-imposed racial segregation in their public schools. Even aggressive action, such as that taken by Robert Reese's father when he went to court in 1926 to challenge intentional efforts to segregate his children, was effectively blunted by Dayton school authorities' commitment to sep-

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[21] *The District Court's Opinion* (Pet. App. 160a-62a). Even if the approach of the district court is followed and the above facts are assessed in total ignorance of the remainder of this massive record, the conclusion would seem inescapable that many of these instances reflect subjective racial malevolence on the part of the school authorities. The district court not only ignores the whole record, however, it also ignores many of these facts; as to others, the court summarily concludes that the evidence reflects nothing more than strict racial neutrality. By themselves and in the context of the other widespread discrimination of record, the facts described above are further evidence of the intentional discrimination which infected the Dayton school system at the time of trial, and, at a minimum, they are part of the deliberate perpetuation of the dual system.

The Court of Appeals' Opinion. The court of appeals did not specifically address this evidence of discrimination in its *Brinkman IV* opinion (in *Brinkman I*, the court concluded that this evidence raised "serious questions," Pet. App. 66a, of racial discrimination, *id.* at 65a-66a), but rather subsumed them within its general "consideration of the legal and factual issues previously reserved by this court in *Brinkman I* (*id.* at 194a) and its overall conclusion that in the post-*Brown* era the Board pursued "racially motivated policies with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization [which] perpetuated or increased public school segregation in Dayton . . . and, in addition, . . . committed affirmative acts that have exacerbated the existing racial segregation." *Id.* at 213a. At the very least, as with the "middle school reorganization," these diverse transfer policies and practices are another "of the areas in which defendants failed to disestablish Dayton's dual school system." Pet. App. 213a.

aration of the races. *See* pp. 14-15, *supra.* During another period of active unrest, 1951-52, the Board imposed the West-Side reorganization and a new racially discriminatory faculty-assignment policy. *See* pp. 23-27, *supra.* The black community's repeated protests following *Brown* to the continued segregation also were turned aside. *See* App. 52-53-Ex. (PX 9), 150-51-Ex. (PX 13A), 152-Ex. (PX 13B), 153-55-Ex. (PX 13N). By the late 1960's, however, those who objected to state-imposed school segregation began to gain allies, both in the white community in Dayton and among state and federal agencies. As previously noted (*see* pp. 34-35, *supra*), HEW conducted a Title VI compliance review in 1968 and forced the Board in 1969 to agree to end its racially dual faculty-assignment policy. HEW had also noted the "substantial duality in terms of race or color with respect to distribution of pupils in the various schools . . ." (App. 109-Ex. (PX 11A)), but the agency did not pursue this concern with similarly aggressive action. (As is commonly known, from the frequent judicial declarations on the subject, HEW has generally failed to fulfill its Title VI obligations with respect to pupil desegregation in both the North and the South. *See, e.g., Adams* v. *Richardson,* 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*); *Brown* v. *Weinberger,* 417 F. Supp. 1215 (D.D.C. 1976). And it has not been notably aggressive even with respect to faculty segregation. *See Kelsey* v. *Weinberger,* 498 F.2d 701 (D.C. Cir. 1974).)

Also during these years, the Dayton Board, in the 1971 words of the State Department of Education, "passed various and sundry resolutions . . . designed to equalize and to extend educational opportunities, to reduce racial isolation, and to establish quality integrated education in the schools." App. 117-Ex. (PX 12). But these were just words and informal ones at that. As the State Assistant

Superintendent for Urban Education noted at the same time, there was a definite need for action and not just words. App. 116-Ex.

On 29 April 1971, the Board requested assistance from the State Department of Education's Office of Equal Educational Opportunities to provide technical assistance in the development of alternative desegregation plans. The Board also authorized its President to appoint a committee of community representatives to assist and advise the Board in connection with such proposed plans. App. 48-49-Ex. (PX 9).

The State Department of Education responded by assembling a team of consultants and specialists to evaluate data and make recommendations. Their recommendations were submitted to the Dayton Superintendent on 7 June 1971. App. 113-49-Ex. (PX 12). The State Department advised the Dayton Board of its constitutional and other legal obligations (App. 128-Ex.) (emphasis in original):

> Since the Board, *as an agency of state government,* has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative duty to comply with the Constitution; that is, as the Supreme Court has stated, "to eliminate from the public schools all vestiges of state-imposed segregation."

The State Department then turned its attention to a list of alternatives, and urged the Dayton Board to shoulder its constitutional obligations *now* (App. 135-Ex.) (emphasis in original):

> *Delaying tactics could be continued.* The Board, in spite of resolutions and overt commitment, could

choose to make only the slightest mandated changes, and to utilitze the best legal talent available to resist compliance with constitutional requirements. Other school districts have chosen this alternative, even as Dayton has used similar methods in the past. However, the highest court in the land has stated the constitutional offensiveness of state-imposed segregation of school-children, and persisting delay clearly violates the oath of office of members of the Board of Education in the state of Ohio.

The State Department concluded by recommending "a comprehensive plan" that would be a "constitutionally valid and inoffensive, educationally sound, and morally proper" approach for "the Dayton Board of Education, acting as an agency of Ohio State Government . . ." to take. App. 158-Ex. (Under the terms of Opinion No. 6810, issued by the Ohio Attorney General on 9 July 1956, the State Department of Education has the primary affirmative duty to see that local school districts comply with their Fourteenth Amendment obligations with respect to public schooling. App. 331-40-Ex.)

The Board-appointed advisory committee of community representatives became known as the "Committee of 75." In his charge to the Committee, the Dayton Board President stated: "We have admitted that the district is guilty of procedures which have led to the racial isolation of school children." App. 50-Ex. (PX 9). The Committee issued its report in the fall of 1971. The Report of the Committee of 75 (App. 48-63-Ex.) also urged the Board to adopt a comprehensive plan and joined the State Department in emphasizing "that time for a change in Dayton has run out! We must act now." App. 63-Ex.

On 8 December 1971 a majority of the duly constituted Dayton Board—for the first time ever, and perhaps emboldened by the knowledge that they would soon be out of power, the balance of which had been shifted to vocal "anti-busing" candidates who had prevailed in the November elections (*see* App. 198-99)—responded with meaningful action. It first "recognize[d] and admit[ted] that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor Boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs. . . ." App. 15-Ex. (PX 7). The Board then adopted a program of actual systemwide desegregation and directed the Superintendent to implement such a new pupil-assignment policy for the 1972-73 school year. The new policy consisted of two principal parts: first, the existing attendance zones and the Freedom of Enrollment policy were abrogated effective 1 September 1972; second, in their stead, a new pupil-assignment policy was adopted, the goal of which was that no school would have a racial composition "substantially disproportionate to the district as a whole." App. 23-Ex. Pursuant to the Board's directions, the Superintendent of Schools adopted a plan for fall 1972 prepared by Dr. Gordon Foster and others of the Title IV Florida School Desegregation Consulting Center of the University of Miami. App. 64-108-Ex.

On 3 January 1972, however, a newly-constituted Dayton Board (three new members of the seven-member Board had been elected the previous November to take office in January) rescinded the prior Board's action of 8 December 1971, refused to consider the plan adopted by the Superintendent, reinstated the Freedom of Enrollment policy and reimposed the segregated attendance zones. App. 24-46-Ex. (PX 8). By its actions, the new Board made it clear to the

Superintendent that he would not be permitted to exercise his independent authority over the assignment of pupils (*see* App. 254-Ex.; Ohio Rev. Code §3319.01) to implement the pupil-assignment plan he had promulgated and adopted pursuant to the December resolutions. App. 190, 463. The Ohio law just cited vests the local Superintendent of Schools with the responsibility to "assign the pupils of the schools under his supervision to the proper schools and grades," except with respect to the assignment of pupils to schools outside their school districts of residence, where board approval is necessary. The Board thus undid the operative administrative action of the Superintendent and intentionally reinstated systemwide segregation of the public schools.[22]

[22] *The District Court's Opinion* (Pet. App. 180a-85a). In its initial 1973 liability ruling, the district court analyzed the Board's 1972 rescission of its 1971 desegregation resolution and concluded that the Board's action "constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton." Pet. App. 11a. The court completely repudiated this analysis in its 1977 ruling on remand from this Court. The court ignored altogether the findings of the Committee of 75, the State Department of Education, and HEW, as well as the admissions of the Board itself, that the Board was responsible—*i.e.*, had caused—the serious racial segregation of the schools then extant. These findings and admissions of public agencies and their appointed representatives are probative; indeed, in the context of this record they are eminently correct. The district court clearly erred in not assigning weight to, and in refusing to adopt, these findings and conclusions. In addition, the district court failed to evaluate the circumstantial evidence to determine whether evidence of racial discrimination was among the factors motivating the rescission, and the district court similarly failed to determine whether the Board's action undid Superintendent Carle's administrative action which was operative under Ohio law. As a consequence, the court also erred in failing to conclude that the rescission was itself either an independent act of intentional systemwide segregation or the effective frustration of a constitutional remedy for the intentional segregation inherited by the new Board from its predecessors.

The court is clearly mistaken in its apparent conclusion that the Board's December 1971 decisions aimed at curing admitted

7. *The Dual System at the Time of Trial.*

At the time of trial, the Dayton school district was segregated by race, as it always had been. In the 1971-72 school

acts of segregation constituted an effort to "manufacture" a constitutional violation "by political or legal maneuvering." Pet. App. 184a. Here the district judge appears to be relying upon his personal "views as to the obligations and the legal representation of public bodies, and it does not include in my opinion the discussion with non-representing attorneys. . ." App. 485 (statement of the court); *see also id.* at 484-85. These views (contrary to those held by the judge in 1972, when he considered these matters irrelevant, *see* App. 485, 201-02) have to do with the fact that prior to the December 1971 resolutions, Superintendent Carle and some of the Board members met with several persons on different occasions who were knowledgeable about school desegregation in the United States. The judge seemed particularly upset that one of these persons was an attorney, Louis R. Lucas, who subsequently represented (and still does) the plaintiffs in this litigation. Regardless of Judge Rubin's personal views, Dr. Carle was clearly correct in claiming the right to do as he and the Board members did: "We had virtually every month or so been consulting with people who were involved with desegregation and/or legal aspects of desegregation around the country, and this was just one more opportunity to expose myself to a person who had a good deal of experience in the field." App. 485.

Thus, any asserted "manufacturing" of constitutional violations by the December resolutions represented the duly constituted majority's attempt to respond to *their* perceptions of the preceding year's events concerning their hopes and plans for desegregation *and* their defeat at the polls by vocal pro-segregation forces. The Board's December 1971 decision to desegregate the system was, therefore, the considered and resolute product of determinations that affirmative remedial action was required to comply with the Board's constitutional obligations. When the new Board voted on 3 January 1972 to rescind this desegregation program and reinstate segregation across the board, it did more than simply make a different judgment about appropriate educational policy. It deliberately turned back the clock in a demonstrably segregative fashion in response to the dominant white community hostility to desegregation. And it did so without offering any evidence to show that the uniform conclusions of HEW, the Ohio State Department of Education, the Committee of 75, and the 1971 Board and Superintendent of Schools, were either precipitous or incorrect. The rescission undid the desegregation pupil assignments adopted by the Superintendent and intentionally reimposed segregation on

(Footnote continued on following page)

year (when the complaint was filed), there were 69 schools in the Dayton district; 49 of them had student enrollments 90% or more one race (21 black, 28 white). Of the 54,000 pupils enrolled, 42.7% were black; 75.9% of all black students were assigned to the 21 black schools. App. 4-Ex. (PX 2D). In 1972-73 there were 68 schools, of which 47 were virtually one-race (22 black, 25 white). Fully 80% of all classrooms were virtually one-race. (Of the 50,000 pupils in the district that year, 44.6% were black). App. 1-Ex. (PX 2A).

Thus, although the system was larger, it was basically the same dual system that existed at the time of *Brown* (*see* pp. 21-22, *supra*). [It was also the same one that existed in the 1963-64 school year (the first year after *Brown* for which racial data are available). In that year there were 64 schools in the Dayton system, of which 57 had student enrollments 90% or more one race (13 black, 44 white). Of the 57,400 pupils in the district that year,

[22] (Continued)
a systemwide basis. It was a purposeful act of racial discrimination infecting the entire system and again communicating a policy of segregation to all of Dayton's citizens. The district court thus came somewhat closer to the correct analysis in its 1973 opinion, particularly in light of this Court's implicit holding in *Dayton I* that an equal-protection violation would be made out if the Board had "acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967). . . ." Pet. App. 130a, 433 U.S. at 413-14.

The Court of Appeals' Opinion. In its *Brinkman I* decision the court of appeals detailed the facts set forth above. Pet. App. 40a-48a, 53a-56a. In the opinion below, *Brinkman IV*, the court of appeals did not again discuss the rescission, apparently because of this Court's approval (Pet. App. at 130a) of the *Brinkman I* disposition of this issue, which found it "unnecessary to pass on the question of whether the rescission by itself was a violation of [plaintiffs' constitutional] rights." Pet. App. at 56a. In particular, the court of appeals did not address plaintiffs' contention that the rescission did in fact "undo operative regulations affecting the assignment of pupils." *Dayton I*, 433 U.S. at 413.

27.8% were black. Yet 79.2% of all the black pupils were enrolled in the 13 black schools; and 88.8% of all pupils were enrolled in such one-race schools. App. 3-Ex. (PX 2C).]

Every school which was 90% or more black in 1951-52 *or* 1963-64 *or* 1971-72, and which was still in use at the time of trial (1972-73 school year) remained 90% or more black. Of the 25 white schools in 1972-73, all opened 90% or more white and, if open, were 90% or more white in 1971-72, 1963-64, and 1951-52. App. 5-Ex. (PX 2E). *See also Brinkman I*, 503 F.2d at 695.

The Board was operating a dual school system at the time of trial.[23]

E. The Remedy.

The systemwide desegregation plan now in place in Dayton was implemented at the start of the 1976-77 school year pursuant to district court orders on remand from the court of appeals' judgment in *Brinkman II*, 518 F.2d 853, *cert. denied sub nom.*, 423 U.S. 1000 (1975) (Pet. App. 89a).

[23] *The District Court's Opinion* (Pet. App. 149a-50a). The district court did not dispute any of the statistical facts set out in text, but it, of course, concluded that none of the Board's intentionally segregative conduct, which had gone uninterrupted for 60 years, required remedial action.

The Court of Appeals' Opinion (Pet. App. 205a-06a, 213a-14a). The court of appeals concluded that the Board's post-*Brown* conduct, "rather than eradicate the systemwide effects of the dual system extant at the time of *Brown I*, . . . perpetuated or increased public school segregation in Dayton . . . and, in addition, [that the Board] committed affirmative acts that have exacerbated the existing racial segregation." Pet. App. 213a. "The evidence of record demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination and have intentionally maintained a segregated school system down to the time the complaint was filed in the present case." *Id.* at 206a. Accordingly, the court determined that the Constitution demands a remedy.

Upon that remand, the district court appointed an expert, Dr. Charles Glatt, to examine the system and make desegregation recommendations. Dr. Glatt was murdered in the midst of his work in the federal building in Dayton. Thereafter, both plaintiffs and the Board presented plans for the district court, pursuant to its order of 5 November 1975. The Board's plan was prepared by the team of experts appointed by the Board. The Board had voted to submit the plan to the court, but, by vote of 4-3, the Board refused to approve the plan. App. 439. The plan prepared by the Board's experts utilized diverse choice, zoning and curriculum differentiation mechanisms for desegregation, but the plan did not specify actual pupil assignments, and no provision for transportation was included. R.III. 38-40, 52, 67-69, 101, 136-37, 149-51, 206-20, 252-53. Both plaintiffs' experts and the Board's experts were in agreement, however, that approximately 15,000 pupils would have to be transported under either the Board's plan or plaintiffs' plan, and that, because of Dayton's compact nature and the efficiency of its thoroughfares, complete, effective desegregation could be accomplished without presenting any threat to the health, safety or education of school children due to factors of time, distance and amount of transportation. App. 438; R.III. 224; "A Desegregation Plan for the Dayton, Ohio Public Schools," at 127, 138 (2 December 1975) [the Board's plan].

Following an 8 December 1975 hearing, the district court entered an order on 29 December 1975 on the plans submitted. Pet. App. 99a-106a. After summarizing the nature of the plans, the limited nature of federal judicial intervention, and the Board's broad discretion in matters of administrative and education policy (*id.* at 100a-02a), the court gave the Board the following options (*id.* at 102a):

> The defendants may adopt their own plan, may adopt the plaintiffs' plan, may combine the two, or any parts thereof, provided that each school in the school district as of September 1, 1976, is desegregated as defined herein.

Observing that the system was 48% black and 52% white, the court stated that any school would be deemed desegregated if it "reflect[ed] this district ratio plus or minus 15%." *Id.* at 103a. The court set forth two exceptions to this requirement. First, it allowed all students already enrolled in high schools to remain at their present school through graduation because of the importance the court attached to high school "loyalty." *Id.* Second, citing *Swann*, 402 U.S. at 24, the court held that "where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis." *Id.* at 104a. The court then appointed Dr. John A. Finger (who had been the district court's expert in *Swann*) to act as Master pursuant to Rule 53, FED. R. CIV. P., to work out the details of a plan with Dayton school officials. The following guidelines were set for the Master with respect to elementary students (*id.* at 104a):

> 1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
>
> 2. Students should be transported to the nearest available school;
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> 3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

On 15 March 1976 the Master submitted his report. App. 34-52. The Master recommended that elementary schools be desegregated primarily on the basis of the common tech-

nique of pairing schools. With respect to high schools, the Master relied on a program of choices and random assignments limited by racial guidelines. Under his plan, the Master estimated that the maximum distance of travel for any students would be somewhat in excess of 5 miles, but that "the longest travel time should not much exceed 20 minutes." App. 39.

The district court conducted a hearing on the Master's report on 22 and 23 March 1976. At this hearing, the Dayton Board requested several modifications of the Master's plan: to be allowed to reassign pupils to paired schools in advance in the spring by the central administration, rather than by the school principals on the first day of the 1976-77 school year; to be allowed to exchange paired schools (with no transfer of teachers) on an annual rather than semi-annual basis; to be allowed to assign high school students on geographic-zone rather than choice and random-assignment bases; and to phase in the elementary plan over three years (including withholding some 8 schools from the desegregation plan for the 1976-77 year). R.III. 288-89. The Board presented no argument, testimony, or other evidence that any school or child should be excluded from the plan because of any geographic location or claim of excessive distance or time involved in reassignment and transportation.

On 23 March 1976 the district court entered its final order approving the proposed desegregation plan of the Master, with modifications, and directing the Dayton Board to implement the plan for the 1976-77 school year. Pet. App. 110a-13a. The court gave the Board the discretion either to implement the Master's report or the Board's proposed modifications, except insofar as the Board sought a three-year phase-in of the plan at the elementary level. *Id.* at 110a-11a. The district court also

expressed its willingness to consider proposed modifications to the plan at any time from any party. *Id.* at 112a. A judgment was entered on 25 March 1976 in accordance with the 23 March order. Pet. App. 114a-16a. Thereafter, the Dayton Board sought additional modifications which, with one exception (concerning the exclusion of eighth graders from the plan), the district court approved by an order of 14 May 1976. Pet. App. 117a.

The Dayton Board then appealed, and their appeal was heard by the Sixth Circuit on an expedited basis. The court of appeals issued its decision in *Brinkman III* on 26 July 1976. Pet. App. 118a-23a. The court of appeals noted that although its decision in *Brinkman II* had

> ordered system-wide desegregation, the Board proposed no plan to achieve this mandate and made no showing of the existence of conditions related to the topography of the Dayton area, location of natural or artificial barriers, geographic isolation or similar considerations which might militate against an order requiring cross-district transportation of pupils. [*id.* at 121a]

As to the Board's argument that the district court's guiding standard that each school should be within the district-wide racial ratio, plus or minus 15%, the court of appeals said (*id.* at 121a-22a):

> Rather than establishing a fixed mathematical requirement as the Board claims it does, this formula provides a flexible basis of pupil assignment similar to that approved by the Supreme Court in *Swann, supra.* The flexibility of the district court's judgment is further illustrated by the exemption of two entire grades of high school students, the provision for variations from the plus or minus 15% requirement "in excep-

tional circumstances" and the options granted the Board which permitted it to choose alternate methods of achieving desegregation rather than being required to follow in every detail the plan submitted by the Master. We view the use of mathematical ratios in this case as no more than "a useful starting point" in shaping a remedy for past discrimination. *Swann, supra,* 402 U.S. at 25.

Finally, the court of appeals dealt with an argument raised by the Board for the first time at oral argument: that the district court's order required periodic changes in the Dayton plan to maintain a fixed racial balance in perpetuity in violation of this Court's intervening decision in *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424 (1976). The court found that this contention was completely without merit: "The short answer to this argument is that the judgment directs no changes after the 1976-77 school year." *Id.* at 123a. The court noted that the plan ordered by the district court "established the first constitutionally sufficient desegregation plan for the Dayton system. If adjustments to this plan are sought by any of the parties in future years the district court will necessarily consider the limitations of *Spangler* in dealing with such requests." *Id.*

Upon review of the court of appeals' judgment in *Brinkman III,* this Court remanded the case to the district court for further consideration of the violation and of the remedy in light of the extent of the violation, directing that the systemwide plan remain in effect pending such consideration. *Dayton I,* 433 U.S. 406 (1977), Pet. App. 124a. In the proceedings in the district court pursuant to that remand, the Board continued to adhere to its consistent legal strategy of contending that no court-ordered remedy

of any magnitude is permissible. The Board did not propose modifications of the plan with respect to any affected schools, but insisted that it was not constitutionally responsible for the racial composition of a single school. The Board would not even assume *arguendo* that there were at the time of trial any vestiges of any of the Board's conceded intentionally discriminatory conduct; and, consequently, it offered no alternatives to the systemwide plan now in effect. As we asserted below, without challenge from the Board, "[a]s we understand the Board's position . . ., if plaintiffs are correct in their claim of a systemwide violation, then the plan of desegregation currently in place is as good a cure as any." Brief for Appellants 65 and Reply Brief for Appellants 29, 6th Cir. No. 78-3060.[24]

The remedial plan implemented in the fall of 1976 has real potential for eradicating racial discrimination, root and branch, from the Dayton school system. *See* Appendix B to Brief for Respondents in *Dayton I,* No. 76-539.[25]

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[24] In its petition for certiorari and in its brief on the merits to this Court, the Board makes no claim that the systemwide plan now in effect compels any annual reassignments or an otherwise unconstitutional racial balance if the violation is systemwide in scope and impact.

[25] *The District Court's Opinion* (Pet. App. 188a). The district court concluded that none of the racial segregation extant at the time of trial resulted from constitutional violations. The court therefore dismissed plaintiffs' complaint in its entirety.

The Court of Appeals' Opinion (Pet. App. 214a-17a). The court of appeals concluded that the systemic nature of the Board's intentionally segregative practices had had a systemwide impact necessitating an across-the-board remedy. Finding that the Board had not met its burden of showing that a less extensive remedy would be adequate, the court reaffirmed the plan it had approved in *Brinkman III.*

Introduction and Summary of Argument

Introduction

The essence of the questions presented by the Dayton Board here is the same as that presented to this Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971): who is responsible for the flourishing of the basically dual system in the years following *Brown*? And who bears the burden of explaining the continuation of a system of basically one-race schools following *Brown* through the time of trial? Without doubt, it would have been easier to answer these questions as a matter of federal judicial intervention and local administrative practicality by dismantling the basically dual system of public schooling in Dayton in 1954 (and even easier in 1933 or in 1912) than it was to desegregate in 1976, just as it would have been easier to convert Charlotte into a unitary system in 1954 than it was in 1971. But the answer given by a unanimous Court in 1971 in *Swann* still applies with full force to the case here because, as we shall demonstrate, there is no constitutionally principled way to distinguish Dayton from Charlotte on the undeniable facts of record.

It is worthwhile to recall the contours of the answer given by this Court in 1971 to the claim by school authorities that they should not be held responsible for the continuing pattern of largely one-race schooling. The Court did not pretend that the circumstances had remained the same since 1954, when state-imposed school segregation was outlawed in *Brown I*, 347 U.S. 483. The Court acknowledged, and accepted partial responsibility for, the inordinate delay in implementing the command of *Brown II* that officially segregated school systems begin the "transition to a system of public education freed of racial discrimination." 349 U.S. 294, 299 (1955).[26] The Court also noted that the remedial problem had been significantly complicated by the recalcitrance of state and local authorities, by agents of racial discrimination other than school authorities, and by the complexity of urban growth since *Brown*.

As to past delay and the need for refined guidelines, the Court said (402 U.S. at 6):

> These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once. Meanwhile district courts and courts of appeals have struggled in hundreds of cases with a multitude and variety of problems under this Court's general directive. Understandably, in an area of evolving remedies, those courts had to improvise and experiment without detailed or specific guidelines. This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts,

[26] The course from *Brown II* to *Swann* may be traced through the following opinions of this Court: *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Goss* v. *Board of Educ. of Knoxville*, 373 U.S. 683 (1963); *Griffin* v. *County School Bd. of Prince Edward County*, 377 U.S. 218 (1964); *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Bradley* v. *School Bd. of Richmond*, 382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968); *Raney* v. *Board of Educ. of Gould School Dist.*, 391 U.S. 443 (1968); *Monroe* v. *Board of Comm'rs of Jackson*, 391 U.S. 450 (1968); *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 226 (1969) and 396 U.S. 290 (1970); *Northcross* v. *Board of Educ. of Memphis*, 397 U.S. 232 (1970).

of necessity, embraced a process of "trial and error," and our effort to formulate guidelines must take into account their experience.

With respect to non-school forms of racial discrimination having an impact on the problem of persisting school segregation, the Court noted (*id.* at 7):

> In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example, by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education. These findings were subsequently accepted by the Court of Appeals.

Defiance and urban complexity were discussed together, in these words (*id.* at 14) (footnotes omitted):

> The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts. The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or

> negating remedial action before it was fully implemented. Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.

This Court did not absolve urban school authorities of the affirmative remedial obligations imposed in principle by *Green*, and surrender *Brown* to the notion that dismantling dual schooling had been rendered too complex. Instead, the Court, as had District Judge McMillan, confronted reality and applied the spirit of the Fourteenth Amendment, which had been found in *Brown*.[27] Much of the responsibility for delay must be borne by state and local authorities, the Court noted (402 U.S. at 13 & 14):

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[27] District Judge McMillan's findings are reported at 300 F. Supp. 1358 and 1381 (W.D.N.C. 1969); 306 F. Supp. 1291 and 1299 (W.D.N.C. 1969). His understanding from the record evidence of the wide-ranging and enduring impact of operating one set of identifiable "Negro schools" and another of "white schools," and the interaction between such dual schooling and other community discrimination and residential segregation, was not novel. That same experience formed the basis for the landmark decision of the Fifth Circuit on which this Court expressly relied in *Green* v. *County School Bd.*, 391 U.S. 430, 435, 440 (1968), to require actual desegregation rather than the continued "racial identification" of schools under the guise of ineffective "free choice" and "free transfer" schemes. 391 U.S. at 435-442. Judge Wisdom wrote for the Fifth Circuit in *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967):

> Here, school boards, utilizing the dual zoning system, assigned Negro teachers to Negro schools and selected Negro neighborhoods as suitable areas in which to locate Negro schools. Of course, the concentration of Negroes increased in the neighborhood of the school. Cause and effect came together. In this circuit, therefore, the location of Negro schools with Negro facilities in Negro neighborhoods and white schools in white neighborhoods . . . came into existence as state action and continues to exist as racial gerrymandering.

> Over the 16 years since *Brown II,* many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.
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> * * * * *
>
> The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems.

In addition, the impact of faculty assignment and other forms of discrimination not directly involving pupil assignments was independently significant. 402 U.S. at 18-20. Said the Court (*id.* at 18):

> In *Green,* we pointed out that existing policy and practice with regard to faculty, staff, transportation, extra-curricular activities, and facilities were among the most important indicia of a segregated system. 391 U.S. at 435. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

The Court also found that the school authorities had in fact played a segregative role in the patterns of residential development and urban growth. To the school authorities' parroting of "residential patterns over which we have no control," a unanimous Court responded (402 U.S. at 20-21):

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown,* closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the sep-

> aration of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.
>
> In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight.

Finally, the Court assessed the substantial, though not precisely definable, impact that flows directly from a long-standing policy and practice of racial separation (*id.* at 28):

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

While observing that "[o]ne vehicle can carry only a limited amount of baggage" (*id.* at 22), and that

> [w]e are concerned in these cases with the elimination of the discrimination inherent in the dual school system, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds

(*id.*), the Court recognized that "desegregation of schools ultimately will have impact on other forms of discrimination." *Id.* at 22-23. After all, segregation of the schools had certainly had a similar impact in facilitating other modes of discrimination. The Court therefore found it unnecessary to "reach in this case the question whether a showing that school segregation is a consequence of other types of state action, *without any discriminatory action by the school authorities,* is a constitutional violation requiring remedial action by a school desegregation decree." *Id.* at 23 (emphasis added).

In combination, the factors thus assessed by the Court presented "a 'loaded game board'" which often could not be effectively counteracted merely with "'[r]acially neutral' assignment plans." *Id.; see also North Carolina State Bd. of Educ.* v. *Swann,* 402 U.S. 43, 45-46 (1971) (A "'color blind' . . . requirement, against the background of segregation, would render illusory the promise of *Brown*. . . ."). Accordingly, the Court required school authorities and the courts to "make every effort to achieve the greatest possible degree of actual desegregation . . .," 402 U.S. at 26; *see also Davis* v. *Board of School Comm'rs,* 402 U.S. 33, 37 (1971), which adds, "taking into account the practicalities of the situation." The Court thus squarely placed the responsibility for school segregation in a system with a history of state-imposed racial separation on the school authorities (402 U.S. at 26):

> in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional

duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Federal judicial attention was first directed at Charlotte when the plaintiffs there filed their initial complaint in 1965, whereas Dayton did not come under such scrutiny until 1972. Also, Charlotte carried out its program of systematic pre-*Brown* discrimination pursuant to written state law, whereas Dayton accomplished essentially the same result through local policy and practice in contravention of state law. But, as we shall show, there is no constitutional significance in these differences—unless the Court was wrong in its conclusion in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973), that local action can create a dual school system, within the contemplation of *Brown*, just as effectively as statutory command. For after *Brown*, Dayton did pretty much the same thing that Charlotte did: it ignored and resisted its *Brown II* duty; and, by covert policy and persistent practice, it perpetuated and compounded its officially inflicted system of public school segregation from *Brown* through the time of trial. As a result, as we demonstrate in the Argument, *Swann* applies full force to this case.

Summary of Argument

I.

A. *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973), was clearly right in its holding that discriminatory official conduct in violation of ostensible state law can cause as much harm and have as much impact as discriminatory state legislation. This holding is in precise accord with the intent of the framers of the Fourteenth Amendment and the Reconstruction implementing legislation pursuant to which this case is brought, as frequently recognized by this Court. *E.g., Ex Parte Virginia*, 100 U.S. 339 (1880); *Yick Wo* v. *Hopkins*, 117 U.S. 356 (1886); *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278 (1913); *Monroe* v. *Pape*, 365 U.S. 167 (1961). When this Court outlawed state-imposed school segregation in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), it announced a constitutional principle that was as binding with respect to the local segregative policies, practices, customs and usages of Dayton school authorities as it was the statutory dual systems of the South. The Dayton Board could hardly feign ignorance of the applicability of *Brown*, because Ohio school authorities were expressly informed of *Brown's* meaning by an opinion of the Ohio Attorney General *and* a decision of the United States Court of Appeals for the Sixth Circuit in 1956. Opinion No. 6810 (July 9, 1956) (App. 331-40-Ex.); *Clemons* v. *Board of Educ. of Hillsboro, Ohio*, 228 F.2d 853 (6th Cir. 1956); *id.* at 859 (Stewart, J., concurring).

B.1. At the time of this Court's decision in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), the Dayton Board of Education was pursuing a systematic program of racial separation in the public schools which constituted the district basically a dual school system. Defendants' discriminatory policies and practices extended throughout the

system and infected every facet of school administration. This conclusion does not rest on circumstantial evidence (or the standards for analyzing that type of evidence set out in such cases as *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and *Washington* v. *Davis*, 426 U.S. 229 (1976)); nor does this conclusion in any way need support from the evidentiary and burden-shifting principles articulated in *Keyes*. Rather, the conclusion is compelled as a matter of direct and largely uncontroverted evidence.

B.2. In terms of actual segregative impact, the Dayton Board's discriminatory policies and practices over the course of the half century preceding *Brown* are constitutionally indistinguishable from the segregation laws invalidated in 1954. The Board's actions dramatically identified certain schools and certain parts of the system for the education of black students only; reciprocally, other schools and other parts of the system were earmarked for whites. The result was not perfect apartheid, but it was overwhelming state-imposed segregation nonetheless. Just as surely as in Charlotte, the Dayton Board, through its official actions, had prescribed an environment and a mind-set of racially separate public schooling with intractable, far-reaching consequences.

B.3. Contrary to the contention of petitioners, we do not attach decisive evidentiary significance to the year 1954. But that year does have singular legal significance: Upon the decision in *Brown*, the Dayton Board's federal constitutional responsibilities were drastically altered. What the Board did following *Brown* must therefore be evaluated in light of the Board's duty to effectuate "the transition to a system of public education freed of racial discrimination," *Brown II*, 349 U.S. 294, 299 (1955), in accordance with the evolving guidelines laid down by this Court with increasing

specificity during the years between *Brown II* and *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Instead of complying with its constitutional duty, however, the Board continued to pursue many of its overt segregation practices, supplemented by covert discriminatory practices which both perpetuated and expanded the dual system.

II.

A. Now that the court of appeals has confronted the complete record and properly found an intended dual system at the time of *Brown* that Dayton school authorities thereafter perpetuated through the time of trial, the "incremental segregative effect" inquiry described in *Dayton I*, 433 U.S. at 420, does not apply by the express terms of the Court's decision. Whatever the meaning of this cryptic phrase for the remedial inquiry in cases "where mandatory segregation by law of the races has long since ceased" (*id.*), it has *no* meaning independent of *Green*, 391 U.S. at 438, *Swann*, 402 U.S. at 24-26, and *Keyes*, 413 U.S. at 213-14, in this case where just such officially imposed systemwide segregation persisted through the time of trial in the form of a basically dual system created and maintained by local school authorities. In the context of such a systemwide violation having a continuing systemwide impact, a systemwide remedy is required by *Dayton I*, 433 U.S. at 420, *citing Keyes*. 413 U.S. at 213. That such dual schooling was imposed both prior to and after 1954 in contravention of state law rather than pursuant to a state statute is irrelevant. As a result, the remedial inquiry here is controlled by *Swann* and *Green* v. *County School Bd.*, 391 U.S. 430 (1968); adherence to the principles there enunciated dictates the need for a systemwide desegregation remedy, as the court of appeals correctly concluded.

B. At no time between *Brown* and the time of trial did the Board take any action which was either designed to effectuate, or which did in fact effectuate, the transition to a non-discriminatory system of schooling. If the phrase "isolated instances" has any relevance to this case, it is as a description of Board actions resulting in desegregation. Even if the Board's post-*Brown* conduct is deemed to have been "racially neutral" (which it demonstrably was not), therefore, *Swann* and *Green* impose the obligation to bring about a maximum amount of desegregation within the practicalities of the situation, at least in the absence of a convincing demonstration by the Board that the one-race status of specific schools is not attributable in any significant respect to present or past discrimination by school authorities. The Board here, of course, made no such showing; instead, if anything, intentionally segregative conduct following *Brown* not only perpetuated, but also further aggravated the continuing racially dual system of schooling "by intensifying the stigma of implied racial inferiority." *Wright* v. *Council of the City of Emporia,* 407 U.S. 451, 461 (1972); *see also United States* v. *Scotland Neck City Bd. of Educ.,* 407 U.S. 484, 492 (1972) (Burger, C. J., concurring).

III.

A. Alternatively, if the Court determines that the Board's pre-*Brown* program of discrimination resulted in something constitutionally less than a dual school system, the conclusion is still inescapable on this record that the Dayton Board was at the time of trial operating a school system intentionally segregated on a systemwide basis, necessitating a systemwide remedy. Under *Keyes,* the direct evidence of an official pre-*Brown* segregation policy coupled with both direct and circumstantial evidence of post-*Brown* intentional discrimination raises a strong in-

ference that, as of the time of trial, the longstanding and continuing purposeful discrimination on the part of the school authorities was at least one of the primary and proximate causes contributing to the pervasive segregation of the Dayton schools. In light of the extensive and wide-ranging nature of this evidence, the Board bore the burden of disproving this *prima facie* case. *Keyes,* 413 U.S. at 203 and 208-13. The Board did not come close to meeting that burden: it totally failed to show that its systematic program of segregation was not intended.

B. Plaintiffs, under *Swann* and *Keyes,* are thus entitled to a systemwide desegregation remedy, except to the extent that the Board can clearly demonstrate that specific one-race "school assignments are genuinely nondiscriminatory"—i.e., "not the result of present or past discriminatory action on their part," *Swann,* 402 U.S. at 26, despite the Board's proven intent to segregate the entire system. *Keyes,* 413 U.S. at 213-14. The "incremental segregative effect" question of *Dayton I,* no matter whose burden it is, has no meaning in such a context independent of the standards for judging causation and remedy in *Keyes* and *Swann.* Where, as here, the nature and extent of the violation is systemwide intentional segregation, the proper scope of the remedy is actual systemwide desegregation. *Dayton I,* 433 U.S. at 420; *Keyes,* 413 at 213-14; *Swann,* 402 U.S. at 24-26.

IV.

The decisions by this Court in this case and in the companion *Columbus* case do not relate to correcting any aberrant review provided by a single circuit, as charged by petitioners. Instead these cases will determine whether this Court's commitment to "root and branch" relief from intentional segregation within local school districts is to con-

tinue in any meaningful form as the constitutional law of this entire Nation. At stake, therefore, is whether *Brown* is to be rendered a hollow declaration by gutting *Green, Swann,* and *Keyes* and transforming *Dayton I* into a talismanic justification for limiting any school relief to the current and almost complete level of residential segregation. We respectfully submit that, instead, these cases are due to be affirmed so that this and future generations of schoolchildren will not again have to live under a new regime of "separate and equal."

ARGUMENT

I.

At the Time of Trial in This Case the Dayton Board of Education Was Operating a Segregated School System Within the Meaning of *Brown* v. *Board of Education*; That System Had Existed Throughout This Century; It Became Unconstitutional Upon *Brown's* Correct Interpretation of the Fourteenth Amendment in 1954; But, Instead of Being Dismantled, Thereafter It Was Deliberately Compounded Through the Time of Trial.

The parties have taken approaches to the record evidence that are wholly irreconcilable. There has been no offer of compromise from either side, and no position taken which is capable of compromise. This Court is left, as the lower courts have been, with no immediately apparent middle ground. The reason is this: The Dayton Board cannot win without questioning the sincerity of *Brown* and its progeny, and in effect contending that this comparatively brief commitment to equal protection of the laws has been "a vain thing." [28]

[28] *Cf. Screws* v. *United States,* 325 U.S. 91, 100 (1945).

This fundamental conflict in the positions of the parties has been disguised somewhat by petitioners' arguments (Pet. Br. 13-26) concerning the nature and role of evidentiary presumptions to assist in determining the presence or absence of segregative intent. The judgment of the court of appeals, however, does not depend on the use of any presumption concerning intent, and this Court's decision in this case need not turn on such issues (*see* discussion at pp. 90-93, *infra*). And petitioners' "legal presumptions" argument—*e.g.,* that "the Sixth Circuit creat[ed] . . . a legal presumption of systemwide and continuing segregative intent and effect by juxtaposing pre-1954 actions with a current condition of racially imbalanced school populations" (Pet. Br. 13)—is false on its face. Of greater relevance to this Court's review and understanding of the fundamental conflict here at issue, therefore, is the petitioners' suggested approach to analyzing the basic factual question of whether past or present intentionally discriminatory school board conduct contributed to the creation or maintenance of the current condition of school segregation existing at the time of trial.

The controlling assumptions in petitioners' approach are as follows: First, the "focus of judicial inquiry should be on conditions existing at the time of suit" (*e.g.,* Pet. Br. 15), not on the historic process (including school board conduct) leading to the continuing condition of one-race schooling. Second, such extreme school segregation is a "natural" even "inevitable" condition, rarely if ever attributable to the action of school authorities as compared with the "forces" of residential segregation. *E.g.,* Pet. Br. 45-47. It is, therefore, *not probable* that *past* school board administrative policies and practices, even where they have been racially discriminatory, contributed much to the development of present racial patterns; acts of intentional and even across-the-board discrimination occurring fifteen

to thirty years ago (when segregation was not only the official policy but also the accepted community standard) *probably* are *not* connected in any way with the continuing and current condition of segregation. *E.g.*, Pet. Br. 46-54. Third, each item of evidence of intentionally segregative school board action should be evaluated (1) in almost complete isolation from the whole record of school discrimination (and even other evidence relating both to intent and to the development and growth of any system of basically dual schooling) and (2) in the context of the historic and continuing residential segregation (for which, petitioners' argue, they bear neither responsibility nor input). *E.g.*, Pet. Br. 27-39, 45-54.[29]

This is the gist of petitioners' case. It was accepted in its entirety by the district court and condemned to the same degree by the court of appeals. It requires an approach to the evidence that blinks reality. It entails assumptions about the effect of educational policy implementation that do not accord with observed history. It trivializes the impact of an official act of racial discrimination and puts itself at odds with human knowledge and understanding—and with *Brown* v. *Board of Education*. It is so wrong that if it is right, then petitioners and their friends of Court are also correct in their implicit contention that the plaintiffs in cases such as this ought to prevail only in the most extraordinary of circumstances.

In contrast, from the time of trial to this day, respondents have consistently advanced, as their principal theory, the contention that the record establishes beyond doubt that petitioners and their predecessors had basically com-

[29] With these blinders in place, such an approach necessarily limits any finding of violation to current school board practices that *increase* the school segregation above and beyond existing residential segregation.

mitted the same wrong, and therefore were under the same constitutional duty, as the school systems involved in *Brown*. We have urged alternative theories, and they are not waived here. But our primary argument, through four rounds in the courts below and one round here, has been that *Brown*, *Green* and *Swann* apply to this case as a matter of fact.[30] This case was not tried on a principal theory which was dependent upon concepts of *prima facie* case, presumptions, and shifting burdens of production and persuasion.[31] Although *Keyes* was welcome support,[32] plaintiffs' claim for relief did not then, and does not now, rest on *Keyes'* articulation and application of those concepts. The only aspect of the holding in *Keyes* which is relevant to this theory is a rule that is undisputed, and

[30] Petitioners are wrong in their charge that this theory "was first suggested in the amicus brief filed by the Department of Justice when this litigation came before the Court in 1977." Pet. Br. 18. The argument was our first and principal argument in *Dayton I*, *see* pp. 58-71 of Brief for Respondents in No. 76-539, as it was on our first appeal to the Sixth Circuit leading up to *Brinkman I*. *See* Brief for Plaintiffs-Appellants in 6th Cir. Nos. 73-1974-75.

[31] Argument III, *infra*, presents our alternative equal-protection theory based on such evidentiary considerations; it need not be reached if the Court agrees with our Arguments I and II that the Dayton Board created and maintained a dual system. (In addition, the alternative Thirteenth Amendment and statutory theories based on 42 U.S.C. §§1981-1988 should, of course, await at least some consideration in the courts below (*see* note 3, *supra*) before review by this Court.)

[32] This case was tried between 13 November and 1 December 1972, and the district court's first liability decision was filed on 7 February 1973 (Pet. App. 1a), all prior to the announcement of the *Keyes* decision on 21 June 1973, 413 U.S. 189. In its Supplemental Order on Remedy (Pet. App. 26a), filed 13 July 1973, the district court "studied" *Keyes* (Pet. App. 28a) and, apparently in recognition of the fact that its approach was incompatible with the majority opinion in *Keyes*, the court placed exclusive reliance on the dissenting part of Mr. Justice Powell's separate opinion (Pet. App. 29a-30a, 31a) and Mr. Justice Rehnquist's dissenting opinion. Pet. App. 31a.

which has not been the subject of serious debate since *Ex parte Virginia,* 100 U.S. 339 (1880): that the official act of one clothed with state authority can be as harmful —can be as unconstitutional under the Fourteenth Amendment—as the official policy of a state expressed in written statute and constitution; indeed, the practical and constitutional result can be the same even when the official act contravenes state "law." Even those who do not embrace *Green* and *Swann* concede that:

> It is quite possible, of course, that a school district purporting to adopt racially neutral boundary zones might, with respect to every such zone, invidiously discriminate against minorities, so as to produce substantially the same result as was produced by the statutorily decreed segregation involved in *Brown.* If that were the case, the consequences would necessarily have to be the same as were the consequences in *Brown.*

Keyes v. *School Dist. No. 1,* 413 U.S. 189, 256 (1973) (Rehnquist, J., dissenting). How to assess whether such a result obtains is the issue that divides the parties, and apparently the one that divides the Court.

In the Statement of the Case, *supra,* we have traced the history of segregation in the Dayton public schools from "root" to "branch," *Green,* 391 U.S. at 438—the only logical way to evaluate the growth of anything. This approach to the record is no more than recognition of the plain fact that "present events have roots in the past," *United States* v. *Oregon State Med. Soc.,* 343 U.S. 326, 332 (1952), and that past conduct is significant because "it illuminates or explains the present and predicts the shape of things to come." *Id.* at 333. *Accord, e.g., Continental Ore. Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 709-10

(1962); *Standard Oil Co.* v. *United States,* 221 U.S. 1, 75-77 (1911); *Kansas City Star Co.* v. *United States,* 240 F.2d 643, 650-51 (8th Cir. 1950).[33] As a corollary to this sound method of analysis, it is essential that each part of the record be viewed in its total context and that plaintiffs' claims not be approached "as if they were [many] completely separate and unrelated lawsuits." *Continental Ore Co.* v. *United States, supra,* 370 U.S. at 698-99. What the Court said there applies here with equal force (*id.* at 699):

> In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ". . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U.S. 525, 544 . . . ; and in a case like the one before us, the duty of the [court] was to look at the whole picture and not merely at the individual figures in it." *American Tobacco Co.* v. *United States,* 147 F.2d 93, 106 (CA 6th Cir.). See *Montague & Co.* v. *Lowry,* 193 U.S. 38, 45, 46.

Accord, Keyes, 413 U.S. at 200, 203, 207-08.

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[33] In *Keyes,* 413 U.S. at 210-11, the Court confirmed the obvious relevance of this analytical principle to school segregation cases such as this. The Court, referring to *Swann,* 402 U.S. at 31-32, said (413 U.S. at 211):

> We made it clear, however, that a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.

A. A Dual School System, Within the Prohibition of the Fourteenth Amendment and *Brown* v. *Board of Education*, May Be Brought Into Being as Effectively by Local Administrative Policy and Practice as by State Constitutional and Statutory Mandate; Such a System Cannot Stand Under the Fourteenth Amendment Even if It Also Violates State Law.

Petitioners have placed much reliance on the fact that Ohio state law has not authorized racially separate schools for ninety years. But, for even longer than that it has been settled that official conduct which does not afford equal protection of the laws is damned by the Fourteenth Amendment just as much as written state law which produces that result; and this is so even when such official conduct violates state law. In *Ex parte Virginia*, 100 U.S. 339 (1880), the Court invoked the Fourteenth Amendment against a state judge who had "exclude[d] and fail[ed] to select as grand and petit jurors certain [black] citizens . . . possessing all other qualifications prescribed by law" (*id.* at 340), even though "he acted outside of his authority and in direct violation of the spirit of the state statute." *Id.* at 348. The Court held that "immunity from any such [race] discrimination is one of the equal rights of all persons, and that any withholding it by a State is a denial of the equal protection of the laws, within the meaning of the [Fourteenth] Amendment." *Id.* at 345. In words that are now familiar, the Court defined the functional operation of the prohibitions of the Amendment (*id.* at 346-47):

> They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers

> are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

This principle has permeated Fourteenth Amendment jurisprudence ever since. *See also Virginia* v. *Rives*, 100 U.S. 313 (1880); *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Yick Wo* v. *Hopkins*, 117 U.S. 356 (1886). It has been fully applied in behalf of corporate due process. *See, e.g., Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278 (1913); *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20 (1970). And with at least equal force, it has been repeatedly employed in the protection of the human rights secured by the Amendment and its implementing legislation. *See, e.g., Mooney* v. *Holohan*, 294 U.S. 103 (1935); *United States* v. *Classic*, 313 U.S. 299 (1941); *Screws* v. *United States*, 325 U.S. 91 (1945); *Monroe* v. *Pape*, 265 U.S. 167 (1961); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970).[34]

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[34] Of particular significance are the Court's decisions construing 42 U.S.C. §1983, one of the statutes pursuant to which this case is brought. Section 1983 affords a federal-court cause of action against "[e]very person who . . . [acts] under color of any statute, ordinance, regulation, custom or usage, of any State . . . [and thereby] subjects, or causes to be subjected, any cititzen . . . to the deprivation of [Fourteenth Amendment rights] . . . ." This section derives from §1 of the Civil Rights Act of April 20, 1971, 17 Stat. 13, expressly enacted to enforce the Amendment within three years following its adoption. One of the recurring objections to the 1871

When *Brown* v. *Board of Education* was decided in 1954, therefore, it announced a substantive interpretation of the

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Act was the contention that the Fourteenth Amendment operated against the states only with respect to discriminatory legislation; that the Amendment, in the words of one opponent, is "prohibitory only on the legislation of the States." CONG. GLOBE, 42d Cong., 1st Sess. 455 (1871) (Rep. Cox). This position accordingly held that Congress' authority to enforce the Fourteenth Amendment did not extend to forms of state action other than to discriminatory or otherwise unlawful legislation. *See, e.g., id.* at 420 (Rep. Bright), 429 (Rep. McHenry), 600 (Sen. Saulsbury), 661 (Sen. Bickers), app. 160 (Rep. Golladay), app. 208-09 (Rep. Blair of Missouri), app. 231 (Sen. Blair), app. 259 (Rep. Holman); *see especially* the argument of Senator Thurman, leader of the opposition in the Senate, app. 221. The proponents of the legislation flatly rejected this view of the Fourteenth Amendment. Throughout the debates they focused on the conduct of state and local officials, institutions and other instrumentalities of state government. "The laws must not only be equal on their face," said Representative (later President) Garfield, "but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State." *Id.* at app. 153. Clearly it was with the administration of state laws that they were most concerned. *See also, e.g., id.* at 321 (Rep. Stoughton), 334-35 (Rep. Hoar), 375 (Rep. Lowe), 394 (Rep. Rainey), 426 (Rep. McKee), 429 (Rep. Beatty), 444-45 (Rep. Butler), 459 (Rep. Coburn), 482 (Rep. Wilson of Indiana), 607-08 (Sen. Pool), 696-97 (Sen. Edmunds), app. 72 (Rep. Blair of Michigan), app. 80 (Rep. Perry), app. 147 (Rep. Shanks), app. 152-53 (Rep. Garfield), app. 182 (Rep. Mercur), app. 185-86 (Rep. Platt), app. 300 (Rep. Stevenson), app. 309-10 (Rep. Maynard), app. 314-15 (Rep. Burchard).

Thus, in *Monroe* v. *Pape, supra*, 365 U.S. at 180 (*see also id.* at 193 (Harlan, J., concurring)), the Court was compelled to hold:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

This conclusion is reinforced by §1983's reference to "any . . . custom, or usage, of any State." Construing this phrase in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970), Mr. Justice Harlan wrote for the Court:

> Congress included customs and usages within its definition of law in §1983 because of the persistent and widespread discrim-

Fourteenth Amendment that was as applicable to the racially discriminatory policies, practices, customs and usages of the Dayton school authorities as it was to the boards of education involved in *Brown* which were operating segregated schools pursuant to the written command or authority of state law. Nothing in *Brown's* holding—that state-imposed segregation of the public schools is proscribed by the Equal Protection Clause of the Fourteenth Amendment—so much as intimates that its application was confined only to such segregation brought about through written law. *See also* note 43, *infra.* If there was any room for such a view, it was promptly foreclosed in *Cooper* v. *Aaron*, 358 U.S. 1 (1958), where the Court, after quoting from *Ex parte Virginia, supra,* declared that "the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, . . . or whatever the guise in which it is taken. . . ." 358 U.S. at 17.

The Attorney General of Ohio had comprehended this plain meaning even before the decision in *Cooper* v. *Aaron.* In Opinion No. 6810 (9 July 1956), advising the State Board of Education that it should withhold state support from any school district practicing racial segregation, he said (App. 339-Ex.):

> The term "law" as used in Section 3317.14, Revised Code, forbidding the distribution of state funds to school districts which have not "conformed with the

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inatory practices of state officials. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."

The Fifteenth Amendment and its implementing legislation have been construed in a similar fashion. *See, e.g., Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944).

> law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.

At about the same time, the Court of Appeals for the Sixth Circuit also informed Ohio school districts that they were subject to *Brown*. *Clemons* v. *Board of Educ. of Hillsboro,* 228 F.2d 853 (6th Cir. 1956).

Thus, the principle laid down in *Brown* was immediately, and at all times thereafter, binding on the Dayton school authorities.[35] The fact that they and their successors were not brought into federal court to account for their actions until 1972 no more relieves them of their constitutional duty than did the failure of the plaintiffs in Charlotte (*Swann*) and New Kent County (*Green*) to initiate federal suit before 1965. The rights secured in *Brown* were not made available only upon demand.

When *Keyes* expressly held in 1973 that *Brown* is not limited in its application to public school segregation brought about by written state law, the Court merely adhered to what had been squarely decided a century ago in constitutional and legislative design and intent, and reaffirmed in a host of intervening judicial decisions. This case must be decided in accordance with those pronouncements.

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[35] The authors of *Brown* would be astounded to read that "[t]hat decision did not, however, create a new constitutional principle that was valid for the post-1954 era and inapplicable to the years before 1954." Pet. Br. 17.

B. At the Time of *Brown* and Ever After Petitioners Operated a Dual School System in Fact.

We show here that for forty years prior to *Brown* the Dayton Board—in only arguable and partial conformity with the separate-but-equal doctrine of federal law, *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), but contrary to state law—systematically created and operated, pursuant to plain old-fashioned racially discriminatory purpose, a segregated school system. Between *Brown* and the trial of this case, that system was deliberately perpetuated and expanded, though in some instances in more subtle ways.

1. *The Board's Pre-*Brown *Conduct.*

Our case, and the record of intentional school segregation in Dayton, began in 1912, when petitioners' predecessors operated a segregated all-black class, with an assigned black teacher, Ella Lowrey, at the rear door of the "white" Garfield school in West Dayton. At least this early, then, the Dayton Board, through its official action based solely on skin color, proclaimed that there was something wrong with allowing black and white school children to learn together. This proclamation received renewed emphasis when black children at Garfield were transferred to a four-class frame building located in back of the main building, soon expanded by a two-room portable which was later replaced with a four-room permanent structure, totalling eight all-black classes, to which were assigned eight black teachers, wholly segregated from the white teachers and students in the principal school building. This message of segregation as official educational policy was dramatically reinforced during this period when school authorities attempted to chase Robert Reese and his sister back across the Miami River to the blacks-only Garfield "annex" to prevent them from attending a "white" school—action which their father

fortunately had the wherewithal to prevent (as to his children only) through a lawsuit in state court. Despite the success of this litigation, official discrimination continued unabated and was further supplemented by the rigid practice of *never* allowing black teachers to teach white children, by discriminatory treatment of the few black students who were able to attend racially "mixed" classes, and by assigning black orphanage children from across town to the all-black classes at Garfield. Finally, in the early 1930's the Board transferred white teachers and students to other schools and converted the entire Garfield complex into a blacks-only school. *See* pp. 13-17, *supra*.

An official policy, practice, custom and usage of public school segregation was thus set in place on a systemwide basis. What happened thereafter followed the same pattern: the black pupil population continued to grow, and with it grew the Board's segregation policy; black pupils and teachers were directed, through official action, to parts of the system exclusively set aside for them; and wherever black children cropped up in a part of the system not intended for them, they were subjected to racially discriminatory within-school and extracurricular treatment.

In the mid-1930's all of the white teachers and students in the Willard elementary school were transferred to other schools, and Willard was converted into another school for black teachers and black children only. *See* p. 17, *supra*. At about the same time, Dunbar High School was constructed and opened on a systemwide blacks-only basis. The principal and staff all were black. Only black students were assigned—directly, through counselling and disciplinary procedures, and through psychological coercion—from all over the system. Dunbar had no attendance zone, but instead was a systemwide blacks-only school (which continued in fact until 1962). White students living near

the Dunbar school were assigned farther away to predominantly white schools; these high schools also had no attendance boundaries and drew their students on a systemwide basis prior to 1940. *See* pp. 17-19, *supra*.

Between 1943 and 1945 Wogaman, like Willard and Garfield before it, was converted into an all-black elementary school. *See* pp. 19-20, *supra*. These segregative practices were reinforced by insidious practices (in-school discrimination, explicitly segregated or whites-only recreation facilities, race-based pupil counselling procedures) which discouraged black students from attending predominantly white schools in more than token numbers (*see* pp. 15-16, 18-19, *supra*), and by strict adherence to the policy of not allowing black teachers to teach white children under any circumstances. *See* pp. 13-15, 17, 19-20, *supra*. Supplementing these pervasive devices was joint participation by the Board with the official discrimination of public housing authorities. *See* pp. 20-21, *supra*.

The result was that by 1951-52 (the last year prior to 1963-64 for which enrollment data by race are available), 83% of all white students attended schools that were all- or virtually all-white; 54% of the black students were assigned to the four blacks-only schools with all-black staffs (the system was 19% black at this time), and another 19% of the black students were in adjacent schools which were about to be converted (as discussed below) into black schools. *See* pp. 21-22, *supra*.[36]

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[36] To this point, neither the summary of factual conclusions set out in text nor the underlying subsidiary facts are in significant dispute. They are the subject of largely uncontradicted record evidence, the essence of which was not contradicted by the district court, although that court selected petitioners' tactic (*see* Pet. Br. 16, 50) of either ignoring these facts or alluding to them at random as though they were of anecdotal interest only. The court of appeals correctly sized up the significance of this portion of the record. *See* Pet. App. 195a-203a.

In 1951 and 1952 the Board implemented two major actions having profound racial consequences: it put its theretofore unwritten but nonetheless explicit policy of racial separation in the form of written law through formalization and slight modification of the systemwide policy of faculty segregation; and, through a series of complex, but tightly controlled, interlocking maneuvers, reorganized the West Side schools in such manner that, coupled with the other aspects of the segregation policy which had already hemmed 54% of the black pupils and all of the black teachers into educational ghettos, Dayton continued to be, and was at the time of *Brown,* a dual school system in every sense but name. The schemes worked as follows.[37]

In the 1951-52 school year, the Board, through the Superintendent, announced a policy which modified, and for the first time in writing acknowledged the existence of, its rigid policy of never allowing black teachers to teach white children. The modification, preceded by the incredible statement that the Board "is opposed to racial segregation in the public schools" (App. 182-Ex.), promised in self-contradictory terms "to continue and enlarge gradually the program of integration of the educational staff with the objective of having . . . approximately the same proportion of negro teachers as there are negro pupils in the Dayton schools." *Id.*[38] The policy statement then seeks to absolve the school authorities of the previous forty years of official

[37] The basic facts which underlie the summary which follows in text are also not in significant dispute (*see* note 36, *supra*). But petitioners and the district court have viewed them in such isolation from the record and reality, and have so twisted their context and distorted their meaning, as to necessitate the concession from us that these are disputed "factual matters."

[38] Thus the Board defined "integration" as having in its employ enough black teachers to teach the black pupils in the system. The southern dual systems at this time were following a similar "integration" program.

racism and the twenty coming years of segregated schooling by implying that such segregation merely reflects the will of the black community as well as the white (*id.*):

> The school administration will make every effort to introduce some white teachers in schools in negro areas that are now staffed by negroes, but it will not attempt to force white teachers, against their will, into these positions.
>
> The administration will continue to introduce negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers.
>
> The Board of Education does not consider a school to be segregated when the school district, which the school serves, contains children of only one race. Because attendance at Dunbar High School, in the 9, 10, 11, and 12 grades, is voluntary, the Board of Education does not consider Dunbar High School to be a segregated school.[39]

This policy, pretentiously phrased as both a favorable response and a defense to the black community's demands for an end to deliberate school segregation, sent forth an unmistakable message: Segregated schooling has become the official way of educational life in this community; we, the school authorities, despite the fact that our heavy hand is responsible for the establishment and maintenance of this official color line, do not propose to breach it except to the extent that the way of life itself, as determined by the controlling white majority, manifests tolerance of breaches. In other words, having secured a milieu of school segregation the school authorities then, ostensibly, submitted to

[39] Petitioners jest when they refer to this policy as an "unequivocal expression of non-segregatory intent." Pet. Br. 32.

that "natural" milieu the whole questions of if and when changes should take place. This is the genesis of the Board's current defense that school segregation was inevitable and beyond its control or influence. The proposition is denied by the above-quoted policy statement. That policy bespeaks official segregation—not just segregation of teachers, not just random, isolated or unrelated acts of errant discrimination, but a policy of intentional, systematic racial segregation in all aspects of public school operation. No other conclusion is permissible. *See* pp. 23-25, *supra*.[40]

Despite the comprehensive nature and firmness of the systemwide foundation of segregation that had been laid, racially separate schooling was apparently too important to the school authorities and their controlling white constituents just to be left to "natural" forces. Moreover, the black community continued to object to school segregation.

[40] The district judge refused to acknowledge the significance of these facts and their conclusive nature with respect to plaintiffs' contention that the Board was effectively operating a dual system at this time and thereafter. He overlooked the very obvious fact that the Board's pre-*Brown* faculty-assignment policies operated hand-in-glove with the discriminatory pupil-assignment practices, proving beyond doubt that the Board was guilty not only of "intent to segregate," but also of subjective racial malevolence. It is thus absurd for the district court to argue that "[i]n every specific instance brought to the Court's attention in which black faculty were assigned to black schools, the school was already identifiable as being black because of the racial population of the students." Pet. App. 153a. [It is not clear from the opinion whether this statement is intended to apply to pre-*Brown* practices. If it is, it is clearly erroneous: in the four blacks-only schools created before 1954 all-black faculties were assigned simultaneously with all-black student bodies. *See* pp. 13-20, *supra*. The court's statement is also clearly erroneous with respect to post-*Brown* faculty-assignment practices, discussed below.] Discrimination in one aspect of school administration hardly can be justified, and certainly not legalized, on the theory that the same result was being accomplished through other modes of discrimination. Again, the court of appeals properly assessed the significance of the faculty segregation policy. Pet. App. 195a-201a.

In December 1952 the Board adopted a complex scheme affecting the West Side schools which again purported to be a favorable response to the protests of the black community, but which again was a patent artifice for giving the white educational community what it wanted or was perceived to have wanted: reinforced segregation of the schools. The undisputed subsidiary facts are set out in the Statement of the Case, pp. 25-27, *supra*.

The district court's suggestion that the West Side reorganization "was an experiment in integration, and was intended as such" (Pet. App. 155a), is a completely misleading characterization of the facts. The court's conclusion, immediately following the statement just quoted, is that the Board's "purpose was to enable black students to go to an integrated rather than an all-black school if they chose to do so." *Id.* This is getting somewhat closer to what may be half of the truth, which is that the Board, under continuing pressure from the black community to stop mistreating black children, proposed two alternative "plans," neither of which anyone familiar with the facts could possibly have thought would actually result in integration. The Board's purpose in these proposals was to try and appease the black community without seriously breaching the *status quo* of dual schooling in a system with increasing numbers of blacks. This point is indisputable because neither of the Board-proposed options recommended that the status of the four official blacks-only schools be altered in any respect, let alone be "integrated," by the assignment of nearby white children or faculty.[41] And

[41] Instead, the Board merely (1) substituted optional zones to guarantee the ability of nearby whites to continue to avoid attendance at the all-black schools, as they had since the conversion of these schools under the Board's prior transfer policy, and (2) continued to assign virtually all-black faculty to the all-black schools pursuant to the faculty-segregation policy discussed above. In a

beyond doubt, the option the Board implemented could not foreseeably have resulted in anything other than further entrenchment of the dual system, which is what happened. *See* pp. 25-26, *supra.*

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fact statement dated 2 December 1954, the Superintendent of Schools looked back on the events of 1951 and 1952 and made the following observations (App. 183-Ex. and 184-Ex.):

> All elementary schools have definite boundaries and children are obliged to attend the school which serves the area in which they reside. The policy of transfers from one school to another was abolished two years ago when the boundaries of several westside elementary schools were shrunken, permitting a larger number of Negro children to attend mixed schools.
>
> * * *
>
> Dunbar High School has no boundary lines. Theoretically, any child in the city can elect Dunbar, but, practically, only Negro children attend. The staff is completely negro, except for Driver Training teachers. Children who attend the high school grades at Dunbar do so by choice. A Negro child can always attend the high school which serves his area.
>
> * * *
>
> At the present time we employ 168 negro teachers out of a total 1,577 teaching positions, which is 10.6%. In September, 1951, the first negro teacher was placed in a mixed school—Weaver School. At the present time we have 17 negro teachers assigned to mixed or all-white schools. In addition, we have at the present time 8 white teachers working in all-negro schools —3 on a full-time basis and 5 on a part-time basis.
>
> * * *
>
> About two years ago we announced a policy of attempting to introduce white teachers in our schools having negro population. We have not been too successful in this regard and at the present time have only 8 full or part-time teachers in these situations. There is a reluctance on the part of white teachers to accept assignments in westside schools and up to the present time we have not attempted to use any pressure to force teachers to accept such assignments. The problem of introducing white teachers in negro schools is more difficult than the problem of introducing negro teachers into white situations. There are several all-white schools which in the near future will be ready to receive a negro teacher.
>
> The policy of sending negro children from Shawen Acres to Garfield School was discontinued this September and these children now attend Van Cleve, Brown, Loos and Shiloh schools.

That this segregative result was also actually intended by the Dayton Board represents the other half of the truth about the West Side reorganization. Three concomitant, intentionally segregative actions taken by the Board prove this second point: the placement of optional zones (to substitute for the prior "free transfer" policy) in white residential areas to allow whites to escape the already heavily black "mixed schools" to which blacks from the all-black schools were assigned; the continuation of systemwide faculty segregation pursuant to a policy expressly premised on racial discrimination (that transferred black teachers in ever increasing numbers *only* to the "mixed" schools, thereby designating them as "black schools," while otherwise maintaining with few exceptions the basic color line for staff at the all-white and all-black schools); and the construction of a new elementary school on the site of the black public housing project and assignment of all-black students and virtually all-black faculty thereto. *See* pp. 25-27, *supra.*

In this way, the Board successfully converted into all-black schools (though in a more subtle and complex manner than the earlier conversions of Garfield, Willard and Wogaman) the "mixed" schools—which in 1951-52 contained about 20% of the system's black students—surrounding the four official blacks-only schools. Hence, at the time of *Brown* three-fourths of the black school children were contained in one-race schools, staffed almost exclusively with black teachers, created and operated pursuant to racially discriminatory policies and practices of systemwide scope. The Board's intentionally segregative actions had been circumscribed by neither geography nor administrative function; they touched all facets of school operation and all parts of the system. This "all lead[s] the mind up to a conviction of a purpose and intent which we think is so

certain as practically to cause the subject not to be within the domain of reasonable contention." *Standard Oil Co.* v. *United States,* 221 U.S. 1, 77 (1911). Petitioners were operating a dual school system at the time of *Brown.*

2. *The Nature of the Dual System at the Time of* Brown.

It perhaps conceals too much to say that Dayton school authorities found it easy, in the years following *Brown,* to maintain and build upon this almost totally segregated, dual school system. But before turning to the details of that conduct, it is helpful, for purposes of constitutional fact-finding and understanding, to assess the magnitude of the intentional segregation that had been practiced for over forty years. Because the system grew from 47 schools enrolling 34,948 pupils, 19% of whom were black, in 1951-52 (App. 2-Ex.), to 69 schools enrolling 55,142 students, 42.7% of whom were black, in 1971-72 (App. 4-Ex.),[42] petitioners suggest (Pet. Br. 29) that there could not conceivably have been any surviving vestiges of their pre-*Brown* conduct present at the time of trial. On its face, the argument transgresses reason and this Court's repeated findings about the intractable nature of intentional school segregation. At bottom, the argument, as we have said (*see* pp. 88-90, *supra*), presupposes that school segregation is a "natural" condition or, at worst, a condition independently brought about by forces of discrimination having no connection with, and wholly uninfluenced by, the discriminatory actions of school authorities. The argument reduces itself to the contention that to educate the entire pupil population of a school district on the basis of race for four decades is inconsequential in terms of segregative impact. If this is true, then the nation and this Court have seriously

[42] In 1951-52 77.6% of all pupils were enrolled in schools that were 90% or more black, or 90% or more white; the comparable figure for 1971-72 is 74.5%. App. 2-Ex. & 4-Ex.

overestimated the importance and influence of public education in a democratic society.

In *Brown I,* 346 U.S. at 493, the Court made the following finding about the significance of public education in our society:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

In this context, the Court recognized the devastating impact of official school segregation (*id.* at 494):

> To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

The Court thus assessed school segregation and its far-reaching consequences "in the light of [public education's] full development and its present place in American life throughout the Nation." *Id.* at 492-93.[43]

[43] The Court noted that "in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern." 347 U.S. at 491 n.6.

The very justification for the "all deliberate speed" remedial timetable selected in *Brown II*, 349 U.S. at 30, was the recognization that the roots of state-imposed segregation ran deep: the Court spoke of "the complexities arising from the transition to a system of public education freed of racial discrimination" (*id.* at 299), of "varied local school problems" (*id.*), of "a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [*Brown*]" (*id.* at 300), and a long list of "problems" that must be met in order "to effectuate a transition to a racially nondiscriminatory school system." *Id.* at 300-01.

This understanding of the entrenched nature of intentional school segregation was not lost—indeed, it was made more apparent—in the years between *Brown II* and *Green*. In the latter case, the Court observed (391 U.S. at 435-56):

> It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the "white" schools. . . . Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about. . . .

The Court found, in fact, that imposed school segregation had been so well fortified that it ordinarily could not be successfully penetrated by so-called "freedom of choice" attacks (*id.* at 437-38):

> In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board

> opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

The Court also found that the failure of school authorities to promptly assault the problem had only entrenched it (*id.* at 438):

> In determining whether respondent School Board met that [*Brown II*] command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system.

The Court has never deviated from this basic understanding of the enormity and severity of intentional racial segregation in the public schools.[44] The Court re-evaluated this impact in great detail in *Swann*, and reached the same conclusion: racial discrimination by school authorities has

[44] The difficulty in eradicating such ingrained segregation caused the Court to direct lower courts to "retain jurisdiction until it is clear that state-imposed segregation has been completely removed." 391 U.S. at 429.

enduring and wideranging segregative results. *See* the quotations from *Swann* in the Introduction to Argument, pp. 75-82, *supra*. *See also Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972); *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972).

And throughout the opinion in *Keyes*, the Court reiterated this understanding of the nature and significance, in terms of segregative impact, of intentional discrimination by school authorities. The Court noted that such discriminatory practices, aimed at blacks, have the "reciprocal effect" of maintaining other parts of the system for whites (*id.* at 201-02); that such racial "earmarking" of the schools "may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools." *Id.* at 202. "[R]acially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions," concluded the Court (*id.* at 203), and "a connection between past segregative acts and present segregation may be present even when not apparent. . . ." *Id.* at 211. Accordingly, the Court held "that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation." *Id.*[45]

[45] As recently as the day *Dayton I* was decided, the Court, in *Milliken II*, forcefully reconfirmed its consistent understanding of the far-flung manifestations of intentional school segregation: "discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual school system founded on racial discrimination." *Milliken* v. *Bradley*, 433 U.S. 267, 283 (1977). Speaking to some of the "inequalities . . . which flow from a longstanding segregated system" (*id.*), the Court found (*id.* at 287):

> Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community.

Petitioners' effort to fritter away the long-term significance of their systematic pre-*Brown* discrimination, on the basis of a presumption that alleged post-*Brown* neutrality and the passage of time somehow overwhelmed the historic system of dual schooling, is thus foreclosed by the decisions of this Court. Moreover, the Board's post-*Brown* conduct cannot be accurately analyzed without a full appreciation for the systemic impact of forty years of unrelenting racial discrimination in the operation of the Dayton public schools. No one can say with certainty what the racial composition of the system's schools would have looked like in 1954 in the absence of this persistent history of official segregation. But this Court's decisions, the Fourteenth Amendment and human knowledge instruct that the segregative impact of this history was profound. At the time of *Brown* the entire root system and the trunk of the dual system in Dayton were firmly established. Even if what happened between then and the time of trial was no more than the growth in that environment of "natural" segregative branches (*cf. Keyes*, 413 U.S. at 211), the entire system would have been unconstitutional. *Green*, 391 U.S. at 435-441. What in fact did happen, however, cannot possibly even be classified as "natural," as we now show.

3. *The Post-*Brown *Era.*

It is not seriously contended that petitioners or their predecessors ever took any affirmative action, other than the 1971 desegregation resolutions which were subsequently rescinded (*see* pp. 59-64, *supra*), to undo any aspect of the officially-imposed systemwide segregation extant at the time

of *Brown*. Petitioners do make a half-hearted assertion that "[w]henever any purpose other than convenience of access emerges unequivocally from the evidence, the purpose is one of improving racial balance." Pet. Br. 27; *see also id.* at 31. But petitioners were not even able to sell this proposition to the district court, which found, from the testimony of two of petitioners' former managing agents, "that with one exception[46] . . . , no attempt was made to alter the racial characteristics of any of the schools." Pet. App. 150a. Even the trial court thus acknowledged "the failure of school officials to take affirmative steps to alleviate this racial imbalance. . . ." *Id.* Petitioner's case is therefore reduced to their principal argument (Pet. Br. 26-27):

> The Dayton Board contends that its intent has been to pursue a racially neutral policy of placing schools where the children are or where they are expected to be in accordance with the directive of section 3313.48 of the Ohio Revised Code.[47]

The Board claims that it has had a "long-standing concern over problems of racial isolation and its intent [has been] to overcome such problems wherever feasible without sacrificing its neighborhood school system." Pet. Br. 31.

[46] The "exception" referred to is the 1952 West Side reorganization which, as we have seen (pp. 105-07, *supra*), was a sham.

[47] Whatever the meaning of this statute's directive that local school boards provide "free education . . . at such places as will be most convenient for the attendance of the largest number thereof" (the statute is quoted in full at page 5 of petitioners' brief), it is clear that in Dayton it did not impose any intradistrict geographical limits or "neighborhood school" constraints on pupil assignments. Witness, for example, the 1933-1962 operation of Dunbar on a systemwide basis, the similar systemwide pupil-assignment basis of Patterson Co-op (which continues to this day); and the long-distance pupil assignments under the various free-transfer, optional-zone, Shawen Acres, overcrowding, hardship, curriculum and Freedom of Enrollment policies which have existed at various times.

Petitioners do not inform us when this "neighborhood school" policy came into being, but it is an appropriate question. *Cf. Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977); *Keyes*, 413 U.S. at 212.[48]

Even if after *Brown* petitioners did pursue a program which all could agree was a racially "neutral policy of putting the schools where children were or where they were expected to be" (Pet. Br. 29), it is manifest that such a system, contrary to the Board's *Brown II* duty to disestablish intentional segregation, effectively froze in the

[48] If it is the Board's contention that it was operating a "neighborhood school system" during the four decades prior to *Brown*, then it is readily apparent that "neighborhood school" is a euphemism for official racial segregation. Was it pursuant to the "neighborhood school" policy that Garfield, Willard and Wogaman were converted into blacks-only schools by transferring both the white teachers and the white students (who presumably resided in those "neighborhoods") in those schools to other, predominantly white schools? Was it mere implementation of the "neighborhood school" concept—whatever it means in the abstract—pursuant to which Dunbar was created in 1933 and operated as a *systemwide* blacks-only high school until 1962, and pursuant to which predominantly white high schools operated on a systemwide basis, without attendance zones, until the 1940's (and one has continued to operate without attendance boundaries to this day)? What did the "neighborhood school" theory have to do with the policy of allowing black teachers to teach only black children, or with the equally racist 1951-52 policy modification? And surely the cross-town transportation of black orphanage children to blacks-only schools, the discriminatory treatment of black children within school and in extracurricular activities, and the leasing of space in official one-race public housing projects for the education of children of corresponding race were not the products of a racially neutral "neighborhood school" policy. Maybe the "neighborhood school" system came into being with the West Side reorganization in 1952 when the policy of free transfers between elementary school zones was ended, and racial optional zones were substituted to achieve the same segregative result. If this is its origin in Dayton, then petitioners' "neighborhood school system" is due to be defined as one which seeks to provide educational opportunities in a maximized segregated environment.

It is against this background that petitioners' "neighborhood school" claim must be weighed.

pre-existing systemwide pattern of deliberate segregation. *See, e.g., Swann,* 402 U.S. at 28, *McDaniel* v. *Barresi,* 402 U.S. 39, 41 (1971); *North Carolina State Bd.* v. *Swann,* 402 U.S. 43, 45-46 (1971); *Gaston County* v. *United States,* 395 U.S. 285, 297 (1969). Such a program would have been unconstitutional in this context, would only have compounded the constitutional wrong and, under *Green* and *Swann,* would not have relieved the Board of its systemwide remedial obligations. But our case need not rest here, because between *Brown* and trial the Board did not follow any comprehensible policy which could be characterized as "racially neutral" or "neighborhood school system."

Petitioners' pre-*Brown* racially discriminatory faculty-assignment policy continued in raw form until HEW intervened in 1969. The Board followed an overwhelming pattern of assigning teachers according to the race of the pupils to be taught. And as the court of appeals found, this policy reinforced the segregative nature of the Board's school construction practices through "the coordinate racial assignment of professional staffs to these schools and additions on the basis of the racial composition of the pupils served by the schools." Pet. App. 210a. In these ways, the Board's race-based faculty-assignment policy continued to earmark schools according to race just as effectively as in the pre-*Brown* years. *See* pp. 32-36, *supra.*[49]

The Board's post-*Brown* school construction and closing practices also had permanent long-run segregative impact.

[49] In addition to the district court's clearly erroneous conclusory factual findings (*see* note 14 *supra*) the court also erred as a matter of law in failing to recognize the significance of intentional faculty segregation as a part of the Board's deliberate perpetuation of the pre-*Brown* dual system, *Green,* 391 U.S. at 435-436, and *Swann,* 402 U.S. at 18, as well as in not recognizing the plain inference that such segregative intent also underlay the Board's school construction and pupil-assignment practices. *See Keyes,* 413 U.S. at 202 and Argument III, *infra,* pp. 136-38.

Dunbar high school continued to be operated as a systemwide blacks-only school until 1962, when it was replaced with a new Dunbar high school with an attendance area defined to coincide with a virtually all-black area in the West Side.[50] Instead of locating the new Dunbar in such a manner as to facilitate its desegregation, or instead of assigning white students to the new school (after all, if the Board could assign black students from all over the system to Dunbar, it could also have assigned white pupils to the school), the Board deliberately chose to maximize segregation. Patent segregative intent is revealed by the location of the new school, by the imposition of a one-race attendance zone, by the assignment of a black principal and a virtually all-black staff, by the continuation of the very *name* of the school for a "new" all-black school, and by what happened to the old Dunbar school. The old Dunbar was converted into McFarlane elementary, whose attendance zone was drawn to take in most of the students attending the blacks-only Willard and Garfield schools, which were simultaneously closed. McFarlane elementary thus opened with an all-black student body; any doubt about whether segregative intent was a motivating factor in this conversion was eliminated when the Board assigned an all-black faculty at the opening of this "new" blacks-only elementary school. *See* p. 40, *supra.* This was unmitigated purposeful segregation. Rather than eliminating these direct vestiges of the pre-*Brown* dual system, the Board deliberately renewed and reinforced its segregation policy.

Throughout the remainder of the system, the Board's post-*Brown* brick-and-mortar practices had a similarly pervasive segregative impact. Practically all construction of

[50] The other city-wide high school which existed at the time of *Brown,* Patterson Co-op, continued as a systemwide and, through the 1967 school year, virtually all-white high school. *See* p. 45, *supra.*

new schools and additions to existing schools resulted in uniracial educational settings. *See* pp. 38-42, *supra*. These practices did not conform to any discernible "neighborhood school" policy or any other identifiable educational philosophy. Even the district court characterized these practices as "a most imprecise science" which "approached the level of haphazard in some instances." Pet. App. 173a. But the district court failed to recognize that the unifying theme in this "haphazard" program was intentional racial segregation: over 90% of *all* new classroom space constructed after *Brown* was on a one-race or virtually one-race pupil-assignment basis, and teachers were assigned thereto on a corresponding racial basis. *See* pp. 39-41, *supra*. Viewed in total isolation from the rest of the record, this overpowering segregative pattern of classroom construction raises a strong inference of intentional segregation: "In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight." *Swann, supra,* 402 U.S. at 21. The coordinate racial assignment of faculties to these classrooms—itself "a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause" (*id.* at 18)—practically makes the inference conclusive. If there is any remaining room for rebuttal by petitioners, it is foreclosed by placing these events in the context of the whole record of intentional segregation.

The Board concedes that its construction practices "maintained racial isolation" (Pet. Br. 34), which is necessarily a concession that its conduct in this regard was violative of its *Brown II* duty to undo, rather than to compound, segregation. But the Board disputes the intentionally segregative nature of this conduct. It seeks to undercut the highly probative value of the racial assignment of teachers

to these new classrooms by asserting that it had long since abandoned its "pre-1951 practice of assigning black teachers to teach only in black schools." Pet. Br. 34. This is demonstrably untrue. It may be argued, with some plausibility, that the continuation of a racial pattern of faculty assignments in those schools which existed in 1951 is no more than a perpetuation, pursuant to the Board's racist policy of so-called "dynamic gradualism" (*see* note 14, *supra*), of pre-*Brown* intentional discrimination. If that were all that the post-*Brown* facts showed with respect to teacher assignments, then perhaps the most that we could contend would be that such perpetuation was part of petitioners' refusal to meet their *Brown II* remedial obligations. But the facts show more. They reveal an across-the-board pattern of faculty assignments identifying *new* classroom space according to race. *See, e.g.,* App. 11-Ex. (PX 4), and p. 39, *supra*. This is not just ancient history manifesting itself; this is indisputable direct evidence of fresh intentional segregation. No other conclusion is conceivable.

In full context, therefore, it is not credible to argue that "[t]he fact that their student compositions reflected the racial composition of the neighborhoods they served does not offset the fact that schools were built accordingly [*sic*] to racially neutral criteria." Pet. Br. 34. In sum, the Board's post-*Brown* construction practices were at war with the affirmative duty to desegregate imposed by *Brown II, and* they constituted ongoing intentional segregation on a systemwide scale.

In the Statement of the Case, *supra,* we have detailed (though not exhaustively) abundant record evidence of the discriminatory purpose and impact of numerous other of petitioners' administrative practices. These include the use of "optional attendance areas" in the fringe

areas between predominantly black and predominantly white attendance zones (pp. 43-49, *supra*),[51] the drawing or maintenance of attendance zones so as to produce contiguous pairs of opposite race schools (pp. 50-51, *supra*), the inefficient use of excess school capacity in the face of more efficient (and cheaper) alternatives that would have had desegregative impact (p. 42, *supra*), the segregative manipulation of grade structures (pp. 52-53, *supra*), the discriminatory implementation of pupil transfers and transportation (including instances of transporting entire black classes to, and segregating them within, otherwise white schools) (pp. 54-57, *supra*), and a Freedom of Enrollment policy implemented in 1969 which was similar, in both design and impact, to the "freedom of choice" and "free transfer" systems invalidated in *Green* and companion cases the year before (pp. 58-59, *supra*). The court of appeals made explicit findings of segregative intent with respect to many of these practices (Pet. App. 209a-13a),[52] and the record evidence convincingly demonstrates that similar intent infected others.[53] When these practices are viewed in the context of the total record, it is clear that they were subparts of a systemwide policy of intentional segregation.

[51] In *Dayton I* this Court recognized "optional zones" as at least arguable devices of purposeful segregation. 433 U.S. at 413. The lower federal courts have frequently found them to be just that. *See* cases cited in note 19, *supra; see also* pp. 106-07 of the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick*, No. 78-610. On the instant record, as the court of appeals determined (Pet. App. 209a-10a), a similar conclusion is inescapable. "Optional attendance areas" were unheard of prior to the early 1950's (except, of course, for the Dunbar high school, which operated as a district-wide optional zone for blacks only from 1933-1962), when they were utilized as a part of the West Side reorganization to facilitate the conversion of the "racially mixed" schools in that area into all-black schools (*see* pp. 26-27, *supra*), and also when the manifestly racial option between Roosevelt and Colonel White was created. *See* pp. 45-46, 48, *supra*. Such zones thus originated in Dayton as part of a scheme of racial separation, and they were frequently employed thereafter to reinforce the idea, made plain through numerous other intentionally segregative policies and practices, that there was something bad about having black and white children attend school together. The fact that such zones sometimes appeared in circumstances having no racial implications proves no more than that the Board found them also adaptable to nonracial political purposes. And, contrary to petitioners' suggestion (Pet. Br. 34), the fact that some of the zones with segregative impact were not abolished or modified when black students began exercising the proffered "option" to attend a white school instead of a black one does not wipe the slate clean. Most of these few situations occurred in the late 1960's and early 1970's when the Board was being subjected to intense constitutional scrutiny—not only by the black community, but now also by a community-wide citizens group, the State Board of Education and HEW. Moreover, the failure to follow one discriminatory act with another does not disprove the purpose of the earlier act, and it does not speak at all to the impact of the earlier act in converting the "sending" school into a one-race black school.

It was against this background that the Ohio State Department of Education, HEW, a Board-appointed citizens committee, the President of the Board, and eventually the Board itself—after extensive deliberations—all concluded that the Board was responsible, both morally and constitutionally, for the systematic segregation of the schools. *See* pp. 60-63, *supra*. But when the Board finally responded with meaningful action, admitted its intentionally systemwide segregative conduct of the past, and shouldered its *Brown II* remedial duty in late 1971, its operative desegre-

[52] To the extent that the court of appeals did not make findings or draw conclusions about these particular facts, we are nevertheless entitled to urge them in support of the judgment below. *Dayton I*, 433 U.S. at 418-19. Unlike the situation in *Dayton I*, however (*see id.* at 416-18), the court of appeals has now confronted the whole record and made findings and drawn conclusions with respect to the bulk thereof. It found clearly erroneous many of the subsidiary, and practically all of the ultimate, findings of the district court.

[53] The segregative nature of many of the practices listed above and numerous lower court decisions finding similar practices to be racially discriminatory are discussed in some detail at pp. 106-08 of the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick*, No. 78-610, to which the Court is respectfully referred.

gation resolutions were subsequently (in early 1972) rescinded by a newly-constituted Board resulting from an election in which desegregation was the primary issue. *See* pp. 63-64, *supra*. The basic facts are not in dispute,[54] but the district court accorded them neither evidentiary nor legal significance. The district court determined that, under this Court's opinion (433 U.S. at 413-14) adopting the rescission portion of the court of appeals' opinion in *Brinkman I* (503 F.2d at 697), the Board's rescission action was not an independent constitutional violation because the Board was under no duty to desegregate. Pet. App. 185a. Since the latter determination is incorrect, as we have shown throughout this brief, the former conclusion is necessarily wrong.[55] There are several other critical errors in the district court's treatment of these facts.

The district court assigned no probative weight at all to the findings and admissions of HEW, the Ohio State Department of Education, the Board-appointed advisory committee of community representatives, the Board's president,

[54] However, the district court's apparent conclusion that the Board, in finally standing up to its constitutional duty, was "manufactur[ing a constitutional violation] by political or legal maneuvering" (Pet. App. 184a), is clearly erroneous. *See* note 22, *supra*. The only difference between the Board's actions of December 1971 and those of January 1972 is that the former were aimed at desegregation while the latter were aimed at reinstating segregation. The rescission action was just as much (if not more) "manufactured" as the earlier desegregation action. The district court apparently has made a purely social value judgment, which is wholly unwarranted on this record, in order to seek to repudiate the findings from its original violation opinion concerning the rescission. *See* Pet. App. 10a-11a.

[55] This Court agreed with the court of appeals that "[i]f the Board was under such a duty [to desegregate], then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution." *Dayton I*, 433 U.S. at 414, *quoting Brinkman I*, 503 F.2d at 697.

or the Board itself, that the Board had over the years engaged in intentional segregative conduct resulting in a segregated school system. In the context of this record, the findings of segregation by public agencies and the admissions of intentional segregation by the school authorities themselves (rare enough in any circumstances) reinforce, rather than detract from, the conclusion that the Board was guilty of intentional systemwide segregation. In addition, the district court should have found that the rescission itself was an independent act of intentional systemwide segregation.[56]

The rescission is therefore a part of the overall constitutional violation, as well as an independent act of systemwide segregation. The public-body findings and ad-

[56] Further analysis shows that the rescission was in fact an act designed "to undo operative regulations affecting the assignment of pupils [and] other aspects of the management of school affairs," within the meaning of this Court's opinion. 433 U.S. at 413. As shown at pp. 63-64, *supra*, the Board's rescission resolutions divested the Superintendent of Schools of his operative authority under Ohio law to determine pupil assignments in accordance with the plan that he had already adopted. Thus, the Board's action, viewed in its particular historical context, violates the Equal Protection Clause. *Cf. Reitman* v. *Mulkey*, 387 U.S. 369 (1967). Moreover, the Board's rescission action, by singling out pupil reassignments for the purpose of desegregation and, with respect to such assignments, stripping the Superintendent of Schools of his otherwise unqualified state-law authority over intra-district student assignments, was "an explicitly racial classification treating racial [pupil assignment] matters differently than other . . . [pupil assignment] matters." *Hunter* v. *Erickson*, 393 U.S. 385, 389 (1969). These facts are more than sufficient to "trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Washington* v. *Davis*, *supra*, 426 U.S. at 242. Analysis under the types of factors described in *Arlington Heights*, *supra*, leads to the same conclusion: race was among the factors motivating the Board's January 1972 rescission of the systemwide policy of desegregation previously announced by the Board and frustration of the Superintendent's pupil-assignment plan previously announced pursuant to the Superintendent's independent authority under state law.

missions underlying the desegregation resolutions are, moreover, entitled to probative weight. The Board has dispelled none of these conclusions.

But whether the rescission and attendant findings and admissions are viewed as a renewal of the Board's long-standing policy of segregation, or whether they are ignored altogether, the record overwhelmingly demonstrates that the Board had deliberately created a dual system by the time of *Brown* which it relentlessly reinforced, expanded and compounded up through the time of trial in 1972. The system thus resulting was constitutionally indistinguishable from that created in Charlotte and condemned in *Swann* as an ongoing dual school system. Through systemwide policies and practices of intentional segregation, supplemented by a host of other intentional discriminatory actions, the Board dramatically marked certain schools and certain parts of the system for the education of blacks only; and, reciprocally, other schools and other parts of the system were set aside and preserved for whites. Pursuant to a pattern that was never breached (App. 1-5-Ex.), over three-fourths of all black students and nearly as great a proportion of white students were in one-race or virtually one-race schools in the 1971-72 school year. App. 4-Ex. (PX 2D). The Dayton Board was operating a covert dual school system at the time of trial, and the remedial principles of *Swann* therefore apply in all respects to this case.

II.

The Remedial Principles of *Green* and *Swann* Entitle Respondents to a Systemwide "Root and Branch" Desegregation Remedy Designed to Eradicate All Vestiges of the Dual System; Petitioners Have Not Met, and Have Not Even Attempted to Meet, Their Burden of Demonstrating That This Constitutional Goal Can Be Fulfilled With a Less Extensive Remedy.

The conclusions, established in Argument I above, that petitioners were essentially operating a dual school system at the time of *Brown* which was deliberately entrenched through the time of trial, bring the remedial principles of *Green* and *Swann* into full play—as this Court squarely held in *Keyes*, 413 U.S. at 213-14, and confirmed in *Dayton I*, 433 U.S. at 420, would be the case upon such a showing of a non-statutory dual system.[57] Before turning to a proper application of those principles, however, it is necessary to respond to petitioners' implicit contention that those principles were repudiated, *sub silentio*, by the "incremental segregative effect" phrase of *Dayton I*, 433 U.S. at 420.[58]

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[57] In their entire argument on the proper scope of the remedy (Pet. Br. 40-54), petitioners neither cite nor discuss the principles laid down in *Green* and *Swann*.

[58] In *Keyes*, 413 U.S. at 203, the Court held that "proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding . . . of the existence of a dual system . . ., in the absence of . . . a determination [that geography or natural barriers divided] the district into separate, identifiable and unrelated units." The Court continued that where the finding of such a non-statutory dual system is made, "as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effectuate a transition to a racially non-discriminatory school system.' *Brown II*, 349 U.S. at 301." In its conclusion, the Court summarized this principle by holding that upon finding such "a dual system, respondent School Board has the affirmative duty to desegregate 'root and branch.' *Green* v. *County School Board*, 391 U.S. at 438.'" *Keyes*, 413 U.S. at 213. Citing this holding,

A. In the Context of an Intentional, Although Non-Statutory, Dual School System, the "Incremental Segregative Effect" Inquiry of *Dayton I* is Governed by *Green* and *Swann*.

The inherent flaw in petitioners' argument about the proper scope of the remedy is its refusal to acknowledge, even *arguendo,* that the Board had ever engaged in intentional systemwide segregation. Thus, in its argument about the nature of the violation (Pet. Br. 13-39), the Board insists on characterizing its segregative conduct as "isolated acts or practices that dated back to periods ranging from twenty to sixty years before the filing of suit." Pet. Br. 30. Only by thus attempting to have its acts of intentional across-the-board discrimination defined as a niggling constitutional violation is the Board able to present its elaborate remedy argument without mentioning *Green* and *Swann*. Pet. Br. 40-54. Having so circumscribed the nature of the violation also allows petitioners to appear to be somewhat more candid in their *remedy* argument about the violation. Hence, in their remedy argument (but nowhere in their violation argument) petitioners gratuitously concede that "constitutional violations by the Dayton Board had occurred in three historic areas—faculty assignment prior to 1951, the opening of the first Dunbar High School in 1933 and a series of isolated practices that occurred at varying times before 1954." Pet. Br. 50. Since these conceded violations have been predefined as petty in nature, the

the Court in *Dayton I*, 433 U.S. at 420, concludes that "if there has been a systemwide impact" from the constitutional violations, there may be "a systemwide remedy." In addition, *Dayton I*, 433 U.S. at 419-420, recognizes that *Swann* remedial standards apply full force to a case "where mandatory segregation by law of the races has [not] long since ceased." As we have demonstrated in Argument I, *supra*, this case is controlled by these remedial standards because the Dayton Board created, perpetuated and compounded such a basically dual system from long before *Brown* through the time of trial.

Board is then able to approach the questions of remedy as though the record revealed only "three separate although relatively isolated instances of unconstitutional action on the part of petitioners." *Dayton I*, 433 U.S. at 413. Within this framework, the Board proceeds to separately analyze the three "isolated" violations and argue that, as of the time of trial, there were no remaining "incremental segregative effects" from these instances of intentional discrimination: whatever the immediate segregative impact of these violations, the Board argues that it had long since been wiped out by alleged corrective action by the Board (in the case of systemwide faculty segregation),[59] by over-

[59] Even if the Board's faculty segregation policy could be unlocked from its hand-in-glove connection with pupil assignments and school construction (*see* pp. 13-27, 32-41, 99-104, 116-19, *supra*), petitioners' argument that "ultimate" faculty desegregation removed all traces of "past assignment practices [which] had identified schools as black or white" (Pet. Br. 51) would not be plausible. The Board erroneously cites the testimony of one of plaintiffs' experts, Dr. Green, for the proposition that racial faculty assignments do not affect "the perception of whether such schools were intended as black schools." Pet. Br. 51. This misstates Dr. Green's testimony by placing sole reliance on an unclear question and answer which were immediately clarified. Dr. Green emphasized that the assignment of black teachers for the first time to selected schools with high percentages of black pupils, as occurred in the West Side reorganization, for example, "could well and perhaps does facilitate that school in becoming perceived as being a black school or black area if I might use that term." App. 113. A different point made by Dr. Green, which seems to confuse petitioners, is that "desegregating the faculty of a particular school community when in the past [there] has been a systematic placement of teachers to schools based on race, based upon the racial composition of the school and using the race of the teacher as a factor, simply desegregating the faculty without at the same time desegregating the pupils or students within that system does not change the community perception of that school." App. 111. There is no inconsistency between these two points: race-based faculty assignments have a causative effect on the racial identifiability of schools; once that effect has taken place, however, more than mere faculty desegregation is required to uproot the segregative impact on pupil attendance patterns.

whelming residential patterns (in the case of Dunbar),[60] and by the passage of time (in the case of the other pre-*Brown* "isolated practices").[61] *See* Pet. Br. 50-54. Even if

[60] Both petitioners and the district court have taken the unsupportable view that the operation of Dunbar as a systemwide blacks-only high school for thirty years had only a discrete, limited segregative impact. The district court, of course, acknowledges the inescapable fact that from 1933 to 1962 the Board openly operated Dunbar as a blacks-only high school for black students from all over the city, but the court then reaches the astounding conclusion that "the effects of the Board's segregative acts [acts, mind you, that continued until 1962 *vis-à-vis* this very same school building] may have lingered [only] into the 1940's"! Pet. App. 169a. [As shown at pp. 40, 117, *supra*, the segregative acts with respect to the original Dunbar building did not cease in the least respect in 1962; they were simply redirected at the same schools with different names, as well as at new schools.] How the effects of acts can terminate 20 years before the acts themselves cease is not revealed in the district judge's opinion. The district court's only explanation apparently was that "The effects of the Board of Education's segregative acts in 1933 were totally subsumed in the effects of five to six decades of housing segregation in which the Board played no part." Pet. App. 170a. There are four fallacies in this statement. First is the implicit proposition that the Board's only "segregative acts" occurred in 1933, as if operating Dunbar as a blacks-only, city-wide school for the next three decades entailed no additional segregative acts and otherwise was harmless error. Second, the Board *did* play a direct and explicit part in housing segregation, including by the very location of such a systemwide blacks-only school in the heart of the black population concentration. *See* note 15, *supra*, and pp. 131-32, *infra*. Third, the finding totally ignores the direct impact and reciprocal effect of operating such a school on the racial composition of white high schools throughout the city. *See* pp. 17-19, *supra*, and 131-32 *infra*. Finally, the statement completely overlooks the fact that such intentionally segregative practices "may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools," *Keyes*, 413 U.S. at 202. *See also Swann*, 402 U.S. at 20-21, *readopted* in *Keyes*, 413 U.S. at 202-03. The propositions advanced by petitioners and the district court defy human experience.

[61] If the approach to the "incremental segregative effect" inquiry urged by petitioners is relevant in any context, it would be limited to an evaluation of the segregative impact of such "isolated practices" as those discussed in this part of petitioners' brief. But it has no place in this case, because the practices in question here were not "isolated"; rather, they were part and parcel of a systemwide segregation policy.

petitioners had an accurate view of the nature of the violation, we would disagree with their application of the "incremental segregative effect" test, for the reasons, among others, discussed in the margin. *See* notes 59-61, *supra*. But petitioners have not described the nature and extent of the violation in this case; as we demonstrated in Argument I, they have missed it by a country mile.

But the structure of petitioners' argument does seem to imply a necessary concession: if there has been a systemwide violation, there must be a systemwide remedy. That is, even if petitioners are right in their approach to the "incremental segregative effect" question in a case in which the violations really are isolated and anecdotal,[62] an entirely different approach is mandated by *Green* and *Swann* in a case in which intentional segregation has been practiced on a systemwide basis. This can be the only meaning of the paragraph in *Dayton I*, 433 U.S. at 420, relied upon by petitioners. *See* note 58, *supra; see also* pp. 134-42 of

[62] Even in such a case, however, the Board's contention, accepted by the district court (Pet. App. 146a), that "the plaintiff in a case of this nature must in the first instance carry the burden of establishing both constitutional violations and the incremental segregative effect of those violations" (Pet. Br. 42), is wrong. It has never been the law that the victim of an illegal act must also bear the burden of proving that he would not have suffered the complete injury intended in the absence of the wrongdoer's illegal conduct. *See, e.g., Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 286-287 (1977); *Arlington Heights, supra*, 429 U.S. at 270-71 n.21; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 771-73 (1976); *Keyes*, 413 U.S. at 211 n.17; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-25 (1969); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Paper Co.* v. *Paterson Paper Co.*, 282 U.S. 555 (1931); *Lewis* v. *Pennington*, 400 F.2d 806, 817 (6th Cir. 1968).

Brief for Respondents in *Columbus*. To contend otherwise is to remove the "incremental segregative effect" holding of *Dayton I* from its *ratio decidendi* of manifestly isolated violations (433 U.S. at 413), and to suggest that the Court there secretly overruled or modified the unanimous holdings in *Green* and *Swann*. We are confident that if the Court in *Dayton I* had intended to discard these precedents, it would have done so in a more forthright manner.

We have no quarrel with the precise holding in *Dayton I*, and we have no dispute with the "incremental segregative effect" test as an appropriate method of implementing the remedial requirements of *Green* and *Swann*—that all vestiges of intentional discrimination by school authorities be totally eradicated—in the context of a finding of comparatively minor constitutional violations. But now that the court of appeals has confronted the bulk of the overwhelming record evidence and found a basic dual school system at the time of *Brown* and ever after, the remedial inquiry is governed by *Green* and *Swann*.

B. Green *and* Swann *Require a Systemwide Remedy in This Case.*

In *Green* the Court established the basic principle: school boards operating dual school systems were "cleary charged [by *Brown II*] with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-38. *Swann* applied that principle to the urban setting. As we have shown in the Introduction to Argument, pp. 74-82, *supra,* the Court in *Swann* found that intentional segregation by school authorities has played a profound role in creating the present patterns of segregated schooling. The constitutional findings made in *Swann* are equally binding here.

Consider, for example, the devastating long-term nature of the Dayton dual system as it existed in the pre-*Brown* era, when the Board first converted and then operated Garfield, Willard and Wogaman as blacks-only lower-grade schools, when black high school students from all over the system were assigned or coerced into the systemwide blacks-only Dunbar high school, when black teachers were not allowed to teach white children under any circumstances anywhere in the system, and when black students who appeared in predominantly white schools were subjected to what even the district court acknowledged to be an "inhumane" and "inexcusable history of mistreatment of black students." Pet. App. 149a. Only by ignoring the fact that "[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people" (*Swann*, 402 U.S. at 20), can it even be suggested that school authorities did not "influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods" (*id.* at 20-21), or that such pervasive school discrimination does not "promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races." *Id.* at 21.

Take Willard, Garfield and Wogaman, which were converted into blacks-only schools by transferring their white students and faculties to other schools. Would a white family observing these circumstances, which identified these schools as undesirable for whites, ever consider residing in the Garfield, Willard or Wogaman attendance areas? It seems highly unlikely, at best. And how about a black family observing (as many did, *see* pp. 15-16, 18-19, *supra*) the degrading forms of discrimination practiced against black elementary and high school students who attended predominantly white schools, and who would never have

contact with black adult teachers and administrators in those educational settings? Would such a family be likely to seek residence in an area near one of the white schools, or would they be more likely to "gravitate" to an area closer to the Dunbar high school and the three elementary schools which had been clearly set aside for the education of blacks only? The latter of the two propositions is the only one that comports with common sense. Even if after *Brown* the Board had done *nothing* more than build "neighborhood schools" and engage in "neighborhood zoning," four decades of such overt discrimination had plainly "lock[ed] the school system into the mold of separation of the races." 402 U.S. at 21.[63]

And it was in this context that *Swann* (*id.* at 26) imposed, and in which it must impose here,

> a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion

[63] This observation is, of course, buttressed by two additional facts. First, the official racial discrimination by school authorities built upon, incorporated and encouraged the corresponding and continuing local custom of racial discrimination, exclusion, and duality in housing. *See* note 5, *supra*. Second, the intentional school discrimination continued after 1954 through the time of trial. *See* pp. 113-24, *supra*. Intentionally segregative Board practices with respect, for example, to optional zones, the similarly "haphazard" school construction program resulting consistently (and only) in a widespread pattern of one-race schools and additions, and the coordinate assignment (through at least 1971) of racially identifiable staffs to "black," "changing," and "white" schools, all served as signals to the community of the racial designation of residential areas and contributed (perhaps imprecisely but surely substantially) on a reciprocal basis to continuing housing discrimination and segregation. Thus Dayton school authorities, both before and after *Brown*, are at least as responsible for the creation of an "environment for segregation," the "growth of further segregation," and the "loaded game board" here as in the circumstances described in *Swann* and *Keyes* to justify systemwide relief.

> from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Petitioners have never claimed that they can meet this burden *if* we are correct about the systemwide nature of the violation.[64] In our opening brief filed in the court below in *Brinkman IV*, we said:[65]

> In the instant case the Board has never tried to meet this burden. As we understand the Board's position . . . , if plaintiffs are correct in their claim of a systemwide violation, then the plan of desegregation currently in place is as good a cure as any.

And in our brief filed in reply to the Board's answering brief for appellees, we repeated this assertion:[66]

[64] There has never been a contention in this case that the remedial plan ordered by the district court following the court of appeals' *Brinkman II* remand (*see* pp. 67-73, *supra*) exceeds the "time or distance of travel" limitations of *Swann*, 402 U.S. at 30. *See* p. 70, *supra*. Following the court of appeals' approval of this plan in *Brinkman III*, the Board contended in its petition for certiorari here, which was granted in *Dayton I*, that the plan ordered by the district court required perpetual racial balance in violation of *Swann* (*see* 402 U.S. at 22-25) and *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976). This claim was not renewed on remand from *Dayton I*, was not presented to the court below, and is not presented here in either the petition for certiorari or in petitioners' brief.

[65] *See* Brief for Appellants in 6th Cir. No. 78-3060 (served 21 February 1978) at p. 65.

[66] *See* Reply Brief for Appellants (served 6 April 1978) at p. 29.

> In our opening brief (pp. 63-64 and 65), we said that "the Board has never . . . contended that plaintiffs are not entitled to a remedial plan such as that now in place *if* plaintiffs are right about the nature of the violation," and that "[a]s we understand the Board's position . . . if plaintiffs are correct in their claim of a systemwide violation, then the plan of desegregation currently in place is as good a cure as any." Defendants' brief (pp. 39-42) does not dispute these statements. The Board, therefore, must be deemed to have waived any defense that the systemwide nature of the violation (if the Court agrees with our description of it) had less than a systemwide impact.

As in their answer brief, petitioners did not take issue with these statements in their oral argument before the Sixth Circuit.

Against this background, the court of appeals' *Brinkman IV* opinion, upon finding a systemwide violation of the nature alleged by respondents, concluded that the systemwide remedial plan approved in *Brinkman III* should be continued in effect. Pet. App. 214a-17a. Similarly, if this Court agrees that the violation was systemwide and continuing, it too must approve the plan now in place. Before this Court, petitioners have not identified a single school which they contend is "genuinely nondiscriminatory" under the *Swann* remedial test. Petitioners have clearly and unmistakeably waived any such contention.[67] The plan which

[67] Even if petitioners' persistent silence on this score is viewed as a part of their tactical "all or nothing" litigation stance, they are entitled to no benefits from this strategy. Petitioners are free in the federal courts to take alternative, or even inconsistent, positions without being prejudiced thereby. But we do not think this silence is so much a strategy as it is an expression of preference: if there has to be substantial desegregation in Dayton, then it is better, as a matter of educational policy and of the long-run stability of

has now been in effect for nearly three full school years holds real promise for converting Dayton into "a unitary system in which racial discrimination would be eliminated root and branch." *Green,* 391 U.S. at 438. That plan is due to be affirmed under the precedents of this Court.

III.

Alternatively, Respondents Have Established, Under *Keyes* and the Facts Essentially Conceded by Petitioners, an Unrebutted *Prima Facie* Case of Systemwide Intentional Segregation Necessitating a Systemwide Remedy.

Here we take the factual case basically as it is conceded by petitioners and demonstrate that respondents, even under this restricted view of the case, have made out an unrebutted *prima facie* case of systemwide intentional segregation under the principles set forth in *Keyes.*[68]

the community and the system, to desegregate on a systemwide basis. If this is the true meaning of petitioners' silence, it is well-founded (*see* pp. 153-56 of the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick,* No. 78-610) and should command the deference of the courts. It is also the only sure way in this case to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965), *quoted* in *Green,* 391 U.S. at 438 n.4.

[68] In our principal argument about the nature of the violation, Argument I, *supra,* we have relied on *Keyes* only for the proposition that a dual school system, within the contemplation of *Brown,* may exist even in the absence of the command or authority of written state law. We showed that the record establishes the existence of such a system as a matter of primary fact. Here we show, in the alternative, that even if the case is accepted on petitioners' factual terms, proper application of the evidentiary principles employed in *Keyes* requires the same conclusion. Application of the *Keyes* principles is discussed at greater length in the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick,* No. 78-610, to which the Court is respectfully referred.

A. Respondents Have Made Out an Unrebutted *Prima Facie* Case of Intentional Across-the-Board Discrimination.

In their argument about the nature of the violation, petitioners concede that "in the 1951-52 school year 54.3% of the black students in the system attended four schools that were 100% black" (Pet. Br. 16), and in their argument about remedy they seem to concede that this result was originally intended by the Board. Pet. Br. 50.[69] Petitioners' express concessions, coupled with the unchallenged and irrefutable record evidence (*see* note 69, *supra*), thus establish that as of 1952 over 54% of the system's black pupils were in blacks-only schools, which continued as such into the 1960's, one of which operated on a *systemwide* discriminatory basis until that time; and that the pre-1951 systemwide policy of absolutely prohibiting contact between black teachers and white children continued (with modifications expressly based on racial discrimination) in effect until at least 1969 through the 1951 discriminatory faculty-assignment policy.

[69] As noted at p. 126, *supra*, petitioners concede the unconstitutionality of their pre-1951 policy of assigning black teachers to teach black children only, of operating Dunbar as a systemwide blacks-only high school, and of various practices such as the separate and unequal treatment of black pupils and teachers at Garfield in the 1910's and 1920's, discrimination against black pupils within predominantly white schools and in extracurricular activities, and the transportation of black orphanage children to blacks-only schools. While petitioners do not expressly acknowledge, they also do not dispute, and never have, the following additional unequivocal facts of record: Willard, Wogaman and Garfield elementaries were deliberately converted into blacks-only schools in the 1930's and 1940's, all of which continued in that status at least until 1962 (when Garfield and Willard were closed and most of their pupils assigned to the old Dunbar building which was renamed McFarlane); that Dunbar continued as a blacks-only systemwide high school until 1962 (when it was replaced with the new Dunbar building); that faculties continued to be assigned until 1969 in accordance with the explicitly racist 1951 faculty policy.

These intentionally discriminatory policies and practices "did not relate to an insubstantial or trivial fragment of the school system" (*Keyes*, 413 U.S. at 199),[70] and it is not even argued that they were confined to "separate, identifiable and unrelated units" (*id.* at 203) of the system or school administration. Under the *Keyes* evidentiary principles, these facts result in a *prima facie* case of systemic intentional discrimination even more powerful than the case presented in *Keyes*. Petitioners are thus called upon to show "that their actions as to other segregated schools within the system were not also motivated by segregative intent." 413 U.S. at 209; *see also id.* at 210-11.

Petitioners, in response to this *prima facie* case, primarily invoke their alleged "neighborhood school" policy. But as we have seen (*see* pp. 114-15, 130-32, *supra*), this is not a good defense because the alleged "neighborhood school system" came into rhetorical vogue only after 54% of the black children and all of the black teachers had been enclosed in educational ghettos and it was manifest that "neighborhood schools" would largely serve segregative ends; because there really never has been such a neutral "neighborhood school" policy at work in Dayton, as evidenced by the widespread resort to "optional zones," many having immediate racially segregative impact in situations where adherence to "neighborhood school" precepts would otherwise have resulted in desegregation;[71] because, in wholesale contra-

[70] In *Keyes* the Court found a *prima facie* case on the basis of intentional segregation directed at a part of the system containing slightly less than two-fifths of the black pupil population, whereas here the undisputed intentional discrimination (which resulted in *total* segregation, *cf.* 413 U.S. at 199 n.10) was directed at over one-half of the black student population and *all* of the teachers.

[71] The district court correctly found in its initial violation ruling that "an 'optional attendance zone' is a limitation upon this ['neighborhood school'] concept and if carried to an ultimate conclusion, effectively destroys it." Pet. App. 12a-13a. The segrega-

diction to such precepts, Dunbar (blacks-only until 1962) operated as a systemwide "optional zone" until 1962, as did Patterson Co-op (virtually all white through 1967) until the time of trial. The Board's school construction practices, which had the most entrenching segregative impact, also cannot persuasively be justified as the product of a racially neutral "neighborhood school" policy, for two compelling reasons. First, there is nothing about such a policy, not even as articulated by petitioners, which explains why teachers were assigned to these new classrooms on a systematic racial basis. The interrelationship between the Board's expressly discriminatory faculty assignment policy and the construction of new classrooms serves only to reinforce the presumption that petitioners' school construction practices were intentionally segregative on a massive scale.[72] Second, the district court's unchallenged finding that the Board's school construction program was "haphazard" (Pet. App. 173a) severely undermines the possibility that it was part of a consistent policy of any kind, including a "neighborhood school" policy.[73]

In all of the above areas of school operation, therefore, petitioners have failed to rebut respondents' *prima facie* case of intentional segregation. It necessarily follows,

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tive genesis of optional zones in the early 1950's (*see* pp. 43-46, *supra*) bolsters the conclusion that they were frequently infected with segregative intent.

[72] This presumption is also enhanced by the events surrounding the closing of the old Dunbar and opening of the new segregated Dunbar in 1962. *See* p. 40, *supra*.

[73] The presumption that the Board's school construction practices were infected with segregative intent gains additional support from the principle that an inference of such intent arises when school authorities knowingly pursue actions which have the "natural, probable and foreseeable result" of segregation and cannot be explained by the consistent application of racially neutral criteria. *See* pp. 109-14 of the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick*, No. 78-610.

under *Keyes*, that respondents have proved systemwide intentional segregation.[74]

B. Respondents Have Also Proved Their Entitlement to a Systemwide Desegregation Remedy.

At this juncture of the *Keyes* framework, the remedial principles of *Green* and *Swann* come into play and, to the extent that petitioners contend that less than a systemwide remedy will eliminate all vestiges of intentional discrimination from the system, they bear the burden of proving "that a lesser degree of segregated schooling . . . would not have resulted even if the Board had not acted as it did." 413 U.S. at 211; *see also id.* at 211 n.17 and 213. As shown in *Argument II, supra*, petitioners have made no effort to bear this burden, which they could not do in any event given the pervasive impact of their intentionally segregative systemwide conduct.[75] The systemwide desegregation plan now

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[74] Petitioners have constructed a convoluted semantics argument (Pet. Br. 13-39), the essence of which is to suggest that *Keyes* is no longer good law. As we have shown throughout this brief, however, the *prima-facie*-case principles laid down in *Keyes* have a firm factual basis in the real world. Petitioners' argument would lack merit if *Keyes* were no more than a case about the proper arrangement of the common-law rights of private parties. Their argument clearly has no place in a case seeking to fulfill *Brown's* commitment to the command of the Fourteenth Amendment that racial discrimination should play no part whatsoever in the arrangement of public affairs. *See also* Brief *Amicus Curiae* filed herein by the American Civil Liberties Union, in contrast to the "respondents" brief filed here by the Ohio State Board of Education.

[75] And, as pointed out in Argument IIA, *supra*, *Dayton I* has not altered the remedial principles applicable in this context. *See also* pp. 134-51 of the Brief for Respondents in *Columbus Bd. of Educ.* v. *Penick*, No. 78-610. As the Court described the principle in *Milliken II*, handed down the same day as the *Dayton I* opinion, the remedy does not exceed the violation when it speaks, as does the remedy imposed below, directly to it (433 U.S. at 281-82):

> The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate

in effect must therefore also be affirmed under this alternative approach to the case.

IV.

The Decisions by This Court in the Columbus and Dayton School Cases Are Critical to Meaningful Constitutional Review of Remaining Dual School Systems.

As we have demonstrated in Arguments I-III above, the court of appeals in this case has properly applied the controlling constitutional standards to the undeniable facts here of record. We believe that the judgment of the lower courts in the companion *Columbus* case is just as demonstrably correct under this Court's precedents and the record evidence there. *See* Brief for Respondents in No. 78-610. As a result, the Dayton Board's charge (*e.g.*, Pet. Br. 12-13) that the Sixth Circuit is "resisting" the decisions of this Court is totally unwarranted. Nor is the Sixth Circuit alone in providing meaningful constitutional review in school cases pursuant to the application of this Court's rulings to the differing facts and local circumstances of each case. *See, e.g., Morgan* v. *Kerrigan,* 509 F.2d 580 (1st Cir. 1974), *cert. denied* 421 U.S. 963 (1975); *Hart* v. *Community School Board,* 512 F.2d 37 (2d Cir. 1975); *Arthur* v. *Nyquist,* 573 F.2d 134 (2d Cir.), *cert. denied,* 47 U.S.L.W. 3224 (Oct. 2, 1978); *Evans* v. *Buchanan,* 555 F.2d 373 (3d Cir.), *cert. denied,* 434 U.S. 880 (1977), 582 F.2d 750 (3d Cir. 1978), *cert. pending; United States* v. *Columbus Municipal Separate School Dist.,* 558 F.2d 228 (5th Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978); *United States* v. *Texas Educ. Agency,* 564 F.2d 162 and 579 F.2d 910 (5th Cir. 1978), *cert. pending; Higgins* v. *Board of Educ.,* 508 F.2d 779 (6th Cir. 1974); *Oliver* v. *Michigan State Bd. of Educ.,* 508 F.2d 178 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975); *NAACP* v. *Lansing Bd. of Educ.,* 559 F.2d 1042 (6th Cir. 1977), *cert. denied,* 434 U.S. 1065 (1978); *United States* v. *Board of School Comm'rs,* 474 F.2d 81 (7th Cir.), *cert. denied,* 413 U.S. 920 (1973); *United States* v. *School Dist. of Omaha,* 565 F.2d 127 (8th Cir.), *cert. denied,* 434 U.S. 1064 (1977); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973); *Johnson* v. *San Francisco Unified School Dist.,* 500 F.2d 349 (9th Cir. 1974); *Keyes* v. *School District No. 1,* 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976). Such cases demonstrate that the lower courts are *not* attempting, as petitioners charge (Pet. Br. 12-13), "to achieve the same sociological result in states which had no statutory or constitutional mandate for segregated schools as occurred in southern states where such mandates existed." [76]

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to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, see *Pasadena Bd. of Education* v. *Spangler,* 427 U.S. 424 (1976) or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation, as in *Milliken I, supra. Hills* v. *Gautreaux,* 425 U.S. 284, 292-296 (1976). But where, as here, a constitutional violation has been found, the remedy does not "exceed" the violation if the remedy is tailored to cure the "'*condition* that offends the Constitution.'" *Milliken I, supra,* at 738. (Emphasis supplied.)

See also Hutto v. *Finney,* 437 U.S. 678, 687-88 (1978).

[76] Petitioners' *only* suggestion (Dayton Pet. Br. 24-25 and Columbus Pet. Br. 81-82) of a conflict in the legal standards applied by the circuits to review the nature of violation and scope of remedy in school cases is that the Ninth Circuit, unlike some of the other circuits, may have a different point at which the burden of going forward with evidence on segregative intent should shift. Whether there is any substantive as opposed to semantic conflict among the circuits on this narrow point is questionable. In all events, as we demonstrated in Arguments I and II, concerning the proof of continuing dual schooling here, that issue need not be reached in this case at all; and, as we demonstrated in Argument

What petitioners seek in these two cases at bar, therefore, is *not* the correction of any alleged aberration in the nature of the appellate review provided by the Sixth Circuit. Rather, as we stated at the outset of Argument (pp. 88-90, *supra*), petitioners seek to undermine the constitutional command of *Brown I and II*, and their progeny, that actual desegregation is the proper remedy for intentional school segregation that contributes to the current condition throughout a local school district. This challenge to *Keyes, Swann, Green* and *Brown II* is couched in terms of merely "interpreting" *Dayton I* to immunize any arguably "neighborhood school" approach from constitutional challenge and meaningful relief. Dayton Pet. Br. 40-54; Columbus Pet. Br. 52-79. But the upshot of petitioners' "interpretation" is that the desegregation remedy in school cases would hereafter stop at the current level of residential segregation to which petitioners' actions contributed and which remains almost complete here.

As we explained in the Introduction to Argument (pp. 74-82, *supra*), that was precisely the same claim raised by school authorities and squarely rejected by this Court in *Swann*. In Arguments I-III (pp. 88-139, *supra*) we demonstrated that this "interpretation" of *Dayton I* is legally foreclosed by the central holdings of *Keyes, Swann, Green* and *Dayton I* and is factually contradicted by the record evidence in this case. *See also* Brief for Respondents in No. 78-610, where the equally manifest legal and factual error of the defense is also demonstrated with respect to the *Columbus* case.

III, plaintiffs surely made out a *prima facie* case of systemwide intentional segregation under *Keyes, Washington* v. *Davis*, and *Arlington Heights* that defendants failed to rebut, *whatever* the point at which the burden of producing evidence should shift from plaintiff school children to defendant school authorities. *See also* Brief for Respondents in the Columbus case, No. 78-610.

This restrictive "interpretation" of the constitutional understanding of the nature and extent of the intentional school segregation violation and the scope of the essential desegregation remedy would necessarily retire *Brown I* and *II* to a largely symbolic "Hall of Fame." The words of their brave declarations might stand, but their practical meaning, and that of *Green, Swann, Keyes* and *Dayton I*—actual desegregation as the remedy for intentional segregation—would fall by the wayside.[77] The "remedy" in these two cases, and almost every other school case imaginable hereafter, would be continued one-race schooling to the full extent of the current residential segregation. In essence, petitioners' "interpretation" of *Dayton I* asks this Court to withdraw, for all practical purposes, from its considered commitment to actual desegregation as the remedy for racially dual schooling.[78]

On *Brown's* twenty-fifth anniversary, the Dayton Board offers Dayton's black school children almost complete resegregation in separate one-race schools, now and hereafter. Such a racially stigmatizing lesson would only "affect their hearts and minds in a way unlikely ever to be undone," *Brown I*, 347 U.S. at 494. Instead, this Court should inform both the Dayton school children and the Dayton school authorities that the systemwide plan of de-

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[77] As we demonstrated in Argument II, pp. 126-30, *supra*, *Dayton I* held that in circumstances where the violation is genuinely limited or isolated (as in optional zones between three high schools), the remedy must be limited to the impact of the violation, and the causation inquiry must look to the segregative effect of these limited violations rather than make an unwarranted leap to systemwide relief; in addition, however, *Dayton I* confirmed that *Swann* and *Keyes* control full force, in a case such as this, with a history of longstanding and continuing dual schooling. *See* note 58, *supra*.

[78] *See* U.S. Commission on Civil Rights, DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT (February, 1979).

segregation now in effect remains the proper remedy for the basically dual system of schooling existing through the time of trial.

CONCLUSION

The judgment below should be affirmed in all respects.

March 1979.

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MOTION FILED
FEB 22 1979

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

vs.

MARK BRINKMAN, et al.,
Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DAYTON BOARD OF EDUCATION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DAYTON BOARD OF EDUCATION

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On Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DAYTON BOARD OF EDUCATION

This motion of the Pacific Legal Foundation for leave to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule 42. Petitioner Dayton Board of Education and petitioners State of Ohio and Governor of Ohio have consented to the filing of this brief; however, consent has been withheld by counsel for respondents. These consents have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the

purpose of engaging in litigation in matters affecting the public interest. Policy for Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Board has authorized the filing of this brief.

Pacific Legal Foundation believes that this case is of great importance to all citizens of the United States. It raises questions about the abilities of local school boards to administer their school systems with due consideration to population growth patterns, educational requirements, and monetary constraints. Further, it questions the rightful roles of the district court and court of appeals with respect to each other and with respect to remedies granted pursuant to alleged constitutional violations. Finally, and most importantly, this case raises the question of the rights of children, the pawns who too often are shuttled to and fro in order that mathematical formulae be fulfilled.

Pacific Legal Foundation is deeply concerned by the actions of the court of appeals in this case in ignoring the problems inherent in administering a public school system and in ignoring the effect its remedy would have on the children of Dayton. Because of the national significance of this case, Pacific Legal Foundation feels that the present parties cannot adequately represent the interests of the public while at the same time representing their own localized interests.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief amicus curiae be granted.

Respectfully submitted,
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February 20, 1979.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

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MARK BRINKMAN, et al.,
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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DAYTON BOARD OF EDUCATION

INTEREST OF AMICUS

The interest of amicus curiae is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the court of appeals is reported below as: *Brinkman v. Gilligan,* 583 F.2d 243 (6th Cir. 1978) (hereinafter *Brinkman IV*).

STATEMENT OF THE CASE

The facts of this case, as set forth in petitioner Dayton Board of Education's Opening Brief and herein adopted, raise significant issues of grave public concern. Of these,

the issue of local control of public schools, the issue of the proper roles of administrative bodies and federal district and circuit courts with respect to each other, and the issue of the right of children to be free from arbitrary interference with their education are of vital importance.

This case has a lengthy history. In 1972, certain parents of children attending Dayton public schools alleged that the Dayton Board of Education (hereinafter Board) was operating a racially segregated school system in violation of the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983-1988, and 2000(d). Following trial, the district court found that certain actions by the Board were cumulatively in violation of the Constitution and ordered the Board to submit a plan which would fully integrate its schools. The Board plan retained the neighborhood school characteristics of the Dayton school system while removing optional attendance zones and improving teacher assignment practices. All parties appealed this order, and the Sixth Circuit Court of Appeals in *Brinkman v. Gilligan*, 503 F.2d 684 (6th Cir. 1974) (*Brinkman I*), found the remedy inadequate in view of the perceived scope of the violations. That court remanded with instructions to formulate a plan which would eliminate the pattern of one-race schools.

The district court ordered the Board and the plaintiffs to submit plans for integration of the public schools and adopted that plan submitted by the Board. This plan created several magnet schools and a freedom of enrollment policy throughout the system. The plaintiffs again appealed and the court of appeals again held the remedy to be inadequate. It remanded with instructions to prepare a systemwide plan for the 1976-77 school year which would conform to the decisions of the Supreme Court in *Keyes v.*

School District No. 1, 413 U.S. 189 (1973), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *Brinkman v. Gilligan*, 518 F.2d 853, 857 (6th Cir. 1975) (*Brinkman II*).

Following these guidelines, the district court ordered a plan in which every school in the Dayton system had to have a racial composition within 15% of the black-white population ratio of the city. This plan was approved by the court of appeals in *Brinkman v. Gilligan*, 539 F.2d 1084 (6th Cir. 1976) (hereinafter *Brinkman III*). This decision was appealed to the Supreme Court, which granted certiorari (427 U.S. 1060) to consider the court ordered remedial plan in light of the constitutional violations found below.

This Court vacated the decision of the court of appeals stating:

> "Viewing the findings of the District Court as to the three-part 'cumulative violation' in the strongest light for the respondents, the Court of Appeals simply had no warrant in our cases for imposing the systemwide remedy which it apparently did." *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977) (hereinafter *Dayton I*).

The case was remanded to the district court with instructions to make new findings and conclusions with respect to constitutional violations consistent with *Dayton I*, *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). *Dayton I*, 433 U.S. at 419. This Court further cautioned the lower courts to be mindful of the scope of any constitutional violations found when fash-

ioning a remedy. *Id.* at 420. The district court, after taking additional testimony, found no intentional acts of racial discrimination by the Board nor did it find that past acts of the Board had any incremental segregative effects. It therefore dismissed the suit. *Brinkman v. Gilligan*, 446 F. Supp. 1232 (S.D. Ohio 1977).

The court of appeals, stating that the district court erred in failing to accord the proper legal significance to the facts in existence in Dayton prior to the time of *Brown v. Board of Education*, 347 U.S. 483 (1954) (hereinafter *Brown I*), and finding that proper burden shifting principles were not applied, reinstated in whole its earlier decision calling for the racial balance in every school in the Dayton system to match the racial composition of the city. *Brinkman IV*. It is this decision which is now before this Court.

The history of this case is a telling commentary on the attitude of many courts toward the nation's schools. The court of appeals shows little concern with respect to the uncertainties fostered in the parents and children as to their future educational plans and opportunities which may have been diminished or lost while this case has bounced back and forth in the judicial system. Equally disheartening is the inability of the court of appeals to respect the district court's function within the judicial system or to respect the efforts of the Dayton School Board in administering the public schools. The court of appeals' decision vitiates the function of a district court in cases such as this by doggedly insisting that its remedy is the only remedy regardless of findings below. The decision also subordinates the legitimate interests of school boards,

parents, and children by relegating them to the status of ciphers by which mathematical equations can be achieved.

The decision of the court of appeals establishes an unfortunate precedent which renders futile the good faith efforts of school boards to deal effectively with the myriad problems, including race, with which they are faced.

ARGUMENT

I

THE IMPOSITION OF A SYSTEMWIDE REMEDY IGNORES THE CLEAR MANDATE OF DAYTON I

In remanding *Brinkman III* to the district court, this Court instructed:

> "The District Court, in the first instance, subject to review by the Court of Appeals, must make new findings and conclusions as to violations in the light of this opinion, Washington v Davis, 426 US 229, 48 L Ed 2d 597, 96 S Ct 2040 (1976), and Arlington Heights v Metropolitan Housing Dev. Corp. 429 US 252, 56 L Ed 2d 450, 97 S Ct 555 (1977). It must then fashion a remedy in the light of the rule laid down in Swann, and elaborated upon in Hills v Gautreaux, 425 US 284, 47 L Ed 2d 792, 96 S Ct 1538 (1976)." *Dayton I*, 433 U.S. at 419.

This Court, then, established a two part order. First, determine on the basis of the standards set forth in *Dayton I*, *Washington v. Davis*, and *Arlington Heights* whether violations had occurred and the nature and extent of such violations. Second, if violations are found, fashion a remedy according to the standards set forth in *Swann* and *Hills*.

A. The District Court Properly Determined the Absence of Constitutional Violations

The district court performed a careful analysis of the standards set forth by *Dayton I, Washington v. Davis,* and *Arlington Heights. Brinkman v. Gilligan,* 446 F. Supp. at 1235-36. In so doing, the district court, pursuant to the guidelines of *Arlington Heights,* 429 U.S. at 267, examined in detail: the historical background of the Dayton public school system; the specific sequence of events leading up to the status of the school system at the time this action was filed in 1972 in order to shed light on the Board's purposes; departures from normal procedural sequence; and legislative or administrative history.

The district court considered all the facts: those in the pre-*Brown I* era which indicated segregative intent or effect, and those facts which indicated a desegregative intent or effect. This "warts and all" examination revealed that while there had been numerous pre-*Brown I* violations, especially as to faculty assignment, the Board, in 1951, adopted a policy of phasing out segregative faculty placement policies. *Brinkman v. Gilligan,* 446 F. Supp. at 1238. Interestingly, this new policy of integration known as "dynamic gradualism" and described as moving " 'as fast as we can move tactfully, without creating polarization'," *id.,* anticipated the "all deliberate speed" standard adopted by this Court four years later in *Brown v. Board of Education,* 349 U.S. 294, 301 (1955) (hereinafter *Brown II).*

The district court also closely examined the Board's policies regarding attendance zones, school reorganizations, openings and closings, student transfers, site selection, school additions and portable classrooms, school utilization,

and various Board actions. *Brinkman v. Gilligan,* 446 F. Supp. at 1239-52.

Based on the consideration of all this evidence, the district court found that while there are many racially imbalanced schools in the Dayton system, acts of intentional segregation by the Dayton Board of Education had ended more than twenty years earlier. *Id.* at 1253. The district court further found that the plaintiffs had not supplied evidence of segregative intent and incremental segregative effect. The district court, therefore, found that plaintiffs had failed to meet their burden of proof under the standards established by this Court. *Id.*

In short, the district court found, upon examination of all the evidence in all challenged areas, that there was no intentional discrimination based on race and that where adverse impact was in evidence, such impact was not the result of racially based Board decisions. In fact, every action of the Board was found to have rational, nonracial reasons and the plaintiffs were unable to carry their burden of proof as required by *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Development Corporation.* Because no constitutional violations were found, the proper remedy was the dismissal granted.

B. The Court of Appeals Improperly Shifted the Burden of Proof to the Defendants

This Court in *Dayton I* addressed its mandate to both the district court and the court of appeals. That the lower courts reached so widely divergent a result may be explained by the fact the court of appeals utterly ignored the mandate of this Court to consider the standards estab-

lished by *Washington v. Davis* and *Arlington Heights. Dayton I,* 433 U.S. at 419. Rather than conducting an analysis of these basic precedents, as did the district court, the court of appeals created its own standards. In reaching its decision to reinstate in whole its earlier remedy, the court of appeals based its rationale primarily on two points. The court stated that the district court failed to attribute the proper legal significance to the racial characteristics of the Dayton schools' staff in 1954 and further failed to employ proper burden shifting principles in light of these characteristics. *Brinkman IV,* 583 F.2d at 251.

The evidence is undisputed that the history of the Dayton School Board in hiring and assignment of black teachers prior to 1950 was reprehensible. The court fixates on this fact by stating that this alone makes out a *prima facie* case of racial discrimination. *Id.* This holding completely ignores the subsequent remedial action and leaves undisputed the substantive findings of the district court in the post-1950 era.

The undisputed evidence in the district court shows that as a result of the 1951 policy of "dynamic gradualism" to integrate the teaching staff, the Board was in substantial compliance with Department of Health, Education and Welfare guidelines for staff hiring and assignment by the 1971-1972 school year. *Brinkman v. Gilligan,* 446 F. Supp. at 1238. In the year this suit was instituted, therefore, the schools of Dayton were *not* identifiable as to race by the composition of their staff. The court of appeals justifies ignoring almost 20 years of positive racial desegregation by misreading the standards established by this Court:

> " 'We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent *and the segregation resulting from those actions continues to exist,* the fact of remoteness in time certainly does not make those actions any less "intentional." ' " *Brinkman IV,* 583 F.2d at 249, *quoting from, Keyes,* 413 U.S. at 210-11 (emphasis added).

What the court of appeals overlooked in reaching its erroneous conclusions is that "the segregation resulting from those actions" did not exist in 1972 when this suit was filed nor does it exist today.

The court of appeals also addresses pupil assignment practices which, prior to 1950, were, in some cases, segregative. The court states that this fact, again, is sufficient to make out a *prima facie* case of racial segregation. What the court is ignoring is the good faith efforts to deal with this problem. Undisputed evidence adduced at trial shows that the Board attempted to reorganize and integrate the predominantly black West Side schools in 1951. *Brinkman v. Gilligan,* 446 F. Supp. at 1239-40. The court of appeals simply refuses to mention, let alone weigh, such evidence of desegregation efforts on the part of the Board. Unlike the district court's action in examining the facts, warts and all, the court of appeals chose to consider only the warts.

This attitude mirrored that of the court of appeals as described and disapproved in *Washington v. Davis,* 426 U.S. at 237:

> "That the Department had made substantial efforts to recruit blacks was held beside the point and the fact that the racial distribution of recent hirings and of the Department itself might be roughly equivalent to the

> racial makeup of the surrounding community, broadly conceived, was put aside as a 'comparison [not] material in this appeal.'" (Citation omitted, brackets in original.)

It should, of course, be noted that *Washington v. Davis* arose in a jurisdiction which was subject to *de jure* segregation at the time of *Brown I. Bolling v. Sharpe,* 347 U.S. 497 (1954). This fact did not prevent this Court in *Washington v. Davis* from examining the intervening desegregative acts, nor did the prior *de jure* segregation in the District of Columbia make out a *prima facie* case of current segregation and shift the burden of proof to the defendants.

Despite the specific mandate of this Court to consider the standards set by *Washington v. Davis, Dayton I,* 433 U.S. at 419, the court of appeals utterly disregarded this precedent and established its own standard. On the basis of its limited factual consideration, the court of appeals concluded that at the time of *Brown I,* certain Dayton schools were deliberately segregated or racially imbalanced due to the actions of the Board. *Brinkman IV,* 583 F.2d at 251. The court found this sufficient to constitute a *prima facie* violation of the Fourteenth Amendment pursuant to *Swann,* 402 U.S. at 18, and to shift the burden of proof to the defendants. *Brinkman IV,* 583 F.2d at 251.

The passage relied upon by the court of appeals provides:

> "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Swann,* 402 U.S. at 18.

The court of appeals neglects to recognize that this maxim is phrased in the present tense. Notwithstanding, that court interprets the meaning to be: where it was at one time possible to identify a "white school" or a "Negro school." This attitude of the court of appeals was referred to in *Dayton I,* 433 U.S. at 417, as "a sort of 'fruit of the poisonous tree'" view. This impression is reinforced by the court of appeals' reliance for the premise of schools as racially identifiable on the basis of faculty assignment on the chart furnished by the plaintiffs and reproduced in *Brinkman I,* 503 F.2d at 698. This chart shows that only one high school, Dunbar, has a majority of black members on its faculty, and at the stated percentage of 50.3% black, it would take a keen observer to recognize the three tenths of a percent excess which allegedly brands Dunbar as an identifiably "black school."

With a *prima facie* case now established, the court of appeals shifts the burden of proof to the Board. *Brinkman IV,* 583 F.2d at 252. This allows the court to find that the Board has not established that the character of the school system in 1954 was the result of racially neutral acts. *Id.* In effect, the court, by this circular reasoning, now uses its *prima facie* standard to shift the burden of proof to the Board which cannot meet the burden of proving racially neutral acts and thereby creates a *prima facie* case of discrimination. Thus, the court of appeals is now able to conclude:

> "Nowhere in the record do defendants convincingly demonstrate that the systemwide student racial imbal-

ance characteristic of the Dayton public school system since at least the time of *Brown I* likewise was not the product of segregative acts." *Id.* at 254.

Similarly, under its own standards, the court of appeals finds:

"Nowhere in the record have defendants demonstrated that the present systemwide racial imbalance would have occurred even in the absence of their segregative acts." *Id.*

This *prima facie* case/burden shift circle allows the court to ignore, without discussion, the racially neutral or even integrative motives presented by the Board and accepted by the district court.

The court of appeals was given these guidelines by this Court on remand:

"the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed Rules Civ Proc 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors." *Dayton I,* 433 U.S. at 417-18.

The court of appeals certainly did use Rule 52(a). At the outset of its opinion the court states:

"To the extent that any findings of fact and conclusions of law of the district court are to the contrary, they are either clearly erroneous, Rule 52, Fed.R. Civ.P., or are incorrect as a matter of law." *Brinkman IV,* 583 F.2d at 247.

The form is mechanically correct but the substance of this holding is lacking. The court substantiates its holding by the facts extant in 1951 rather than in 1972 as to the error of the district court's interpretation of the applicable law. Any facts which would not support the court's premise are ignored. The court then determines that the Board has an affirmative duty to carry out all actions with the affirmative intent to integrate Dayton schools completely and to "diffuse black and white students throughout the Dayton school system." *Id.* at 256.

This holding and the systemwide transportation plan ordered by the court of appeals in enforcement of the court's racial balance plan is reminiscent of the situation in *Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976). In *Spangler,* this Court noted that the lower court's interpretation of its own systemwide desegregation order:

"appears to contemplate the 'substantive constitutional right [to a] particular degree of racial balance or mixing' which the Court in Swann expressly disapproved. Id., at 24, 28 L Ed 2d 554, 91 S Ct 1267." *Id.* at 434.

Spangler went on to observe that the lower court there apparently believed that it had the authority to impose its racial balance requirement:

"even though subsequent changes to the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible." *Id.*

Under the *prima facie* case/burden shift theory of the court of appeals in *Brinkman IV,* of course, the Pasadena Board

would not have been able to prove these neutral factors. In placing the burden of proof in its proper place, the *Spangler* Court declared:

> "There was also no showing in this case that those post-1971 changes in the racial mix of some Pasadena schools which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to the defendants." *Id.* at 435.

This Court in *Spangler* thus clearly charged the plaintiffs with the burden of showing segregative actions attributable to defendants, even though previous acts of segregation had been proven. In shifting the burden to the defendants to prove that its acts were nonsegregative, the *Brinkman IV* court is incorrect as a matter of law.

II

DESEGREGATION REMEDIES MUST BE SENSITIVE TO THE INTERESTS OF CHILDREN AND PARENTS IN EQUAL ACCESS TO SCHOOLS

A. A Systemwide Remedy Violates Dayton I

In *Dayton I,* this Court stated that even when the three-part cumulative violations found by the district court were viewed in the strongest light for respondents, the court of appeals "simply had no warrant in our cases for imposing the systemwide remedy which it apparently did." *Id.* at 417. On remand, the district court found no racially motivated purpose behind the acts of the Board of Education and consequently determined that no remedy was authorized. *Brinkman v. Gilligan,* 446 F. Supp. at 1253. The court of appeals, through adoption of an incorrect standard of proof, found that the Board had failed to prove its acts

lacked racial animus and reinstated its systemwide remedy.

While amicus curiae, Pacific Legal Foundation, believes with the district court that the evidence does not support a finding of segregation in the Dayton public school system as a result of racially motivated acts on the part of the Board, and that, therefore, no remedy is authorized, amicus believes that the issue of the scope of remedy imposed by the court of appeals should be addressed.

The court of appeals adopted the standard that the existence of a dual school system at the time of *Brown I* embraced a systemwide program of segregation affecting a substantial portion of the schools, teachers, and facilities and thus had systemwide impact. Second, the failure (by the court's reverse standard of proof) after 1954 to desegregate the school system had a systemwide impact. Finally, the impact of defendants' practices according to that court "clearly was systemwide in that the actions perpetuated and increased public school segregation in Dayton." *Brinkman IV,* 583 F.2d at 258. Of course, under this view, any segregative act, no matter how limited the scope, would perpetuate and increase public school segregation and thereby have systemwide impact. Such a standard is plainly wrong. This Court, in *Dayton I,* reemphasized that even though constitutional violations had been found (which presumably would perpetuate and increase public school segregation), the imposition of a systemwide remedy exceeded the scope of the violations. *Dayton I,* 433 U.S. at 417.

Restricting the scope of desegregation remedies is based on policy considerations of protecting the interests of all

those affected by the remedy, be they school administrators, students, parents, or taxpayers.

B. Local School Boards Are the Proper Bodies to Initiate and Implement Desegregation Plans

This Court, in discussing the complexities arising from a transition to unitary school systems, has stated:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems." *Brown II*, 349 U.S. at 299.

The existence of these varied local problems is the precise reason that courts should not be quick to take on the role of superintendents of public instruction.

This principle was reemphasized in *Dayton I:*

> "But our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition. It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Id.* at 410 (citations omitted).

In *Austin Independent School District v. United States*, 429 U.S. 990 (1976), this Court vacated the judgment ordering a systemwide remedy of another court of appeals and remanded in light of *Washington v. Davis*. In a concurring opinion, Mr. Justice Powell noted that the court of appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified. Justice Powell also pointed out

that Austin, as is the case with Dayton and most larger cities, suffers from residential segregation which creates significant problems for school officials seeking to achieve a nonsegregated school district. As Justice Powell observes, such residential patterns are typically beyond the control of school authorities and are more a function of economic pressures and voluntary preferences. Under these circumstances, there was no evidence in the record to suggest that, absent the constitutional violations found by the lower court, the Austin school system would have been integrated to the extent contemplated by the court's desegregation plan. *Id.* It is submitted that a similar situation exists in this case. Even if the presumptions of violations established by the court of appeals were correct, there is no suggestion in the record that, absent such violations, the schools would have achieved the predetermined racial balance ordered by the court.

In Dayton, the School Board is faced with much the same problems as are the boards of any multi-racial, growing city. It faces the need to select and purchase sites for construction; develop curriculum programs which will provide the best education possible; hire staff and administrative personnel; and accomplish these duties within a framework of limited budgets and rising costs. The Board must also consider these factors in light of neighborhood school policies and in accordance with the varied interests of the parents and citizens of the city. In the face of these considerations, the modern record of the Dayton School Board has been exemplary.

As noted previously, the Board, in 1951, instituted a policy of "dynamic gradualism" in order to phase out a

segregative policy of teacher placement. The Board also attempted in the same year to reorganize the schools on the west side of Dayton in order to integrate the black schools located there. By initiating these programs and by other actions, such as the assignment of the black children of the Shawen Acres Orphanage to predominately white schools in 1950 (*Brinkman v. Gilligan*, 446 F. Supp. at 1241), the Board has shown a great sensitivity to the racial problems of Dayton. It cannot be inferred that the Board has revised this positive, integrative direction in the ensuing 29 years.

Taken in whole, and with consideration to the monumental task of running a public school system, the Dayton Board's action should be supported as an example of a positive effort to remove the vestiges of past racial discrimination.

C. The Rights of All Children and Their Parents Must Be Observed When Fashioning Remedies

Mr. Justice Brennan, in his concurring opinion in *Dayton I*, 433 U.S. at 424, noted that the district court:

> "should be flexible but unflinching in its use of its equitable powers, always conscious that it is the rights of individual schoolchildren that are at stake, and that it is the constitutional right to equal treatment for all races that is being protected."

This passage points out an important and often forgotten element of school desegregation cases—the human element. Too many times courts impose remedies calling for racial balance in the schools based upon the percentages

of the population in the area, forgetting that behind each of the numbers stands a school age child.

In *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974), this Court declared that because local autonomy is perceived to be essential both to the maintenance of community concern and support for the public schools and to the quality of the educational process, no single tradition in public education is more deeply rooted than local control over school operations. Justice Powell, concurring in *Austin, supra*, at n.7, declared that a court has the duty, in fashioning a desegregation remedy, to balance the individual and collective interests. The individual interests, as personal and important as any in our society, relate to the family and to the concern of parents for the welfare and education of their children. Families share these interests wholly without regard to race. As Justice Powell concludes, these factors should be considered in imposing a desegregation remedy the burden of which falls not upon the officials responsible for the offending action, but rather upon innocent children. *Id.*

Many factors contribute to the educational development of the nation's youth. Of these, the school plant and its teaching staff are only one element. Other factors which must be given due consideration are the importance of the parents' place in education, parental involvement in the schools through room mother and parent-teacher programs, opportunities for extra curricular activities, adequate nutrition, and adequate exercise and rest. Although the Board has not explicitly so stated, these factors, to a large part, are best served by a neighborhood school policy such as

Dayton's. Consider, for example, the problems a parent might have in attending a Parent-Teacher Association meeting at his child's school which is located many miles from his home. In an area such as Los Angeles, where some children are bussed to schools 20 miles from home, this important part of child educational development may be totally lacking. Sending children to school many miles from their homes also places an extra burden upon parents who would like to assist in daytime school activities. Parents of modest income may be altogether precluded from helping in the classroom simply because they cannot afford the costs of transportation. Taking children out of their neighborhood schools may also diminish their opportunity to participate in extracurricular activities. Where athletics, band, or other such activities are conducted outside of regular school hours, the child who has to ride the bus may be precluded from participating. Finally, great weight must be given to the physical effects of long distance transportation on the children themselves. It is simply not equitable to extend the school day of elementary children by many hours, in some instances, in order to comply with harsh, systemwide transportation schemes. None of these factors were considered in fashioning the remedies in *Brinkman IV*.

CONCLUSION

School desegregation is a problem with which the courts have been faced throughout the last quarter century. That quite a large number of these cases have come before this Court is a testament both to the great complexities which they present and to the great variety of situations under which they arise. This case is no exception.

The Dayton Board of Education started the process of desegregating Dayton schools and professional teaching staffs in 1950 and at the time of the commencement of this action in 1972 had substantially eliminated all barriers to black children, teachers, and administrators. The Board has been able to accomplish this goal without dismantling the neighborhood schools concept and without creating polarization within the community. There is some evidence of isolated instances of arguably unequal treatment within the 22-year history preceding this case, but the district court found the school system of Dayton to be substantially unitary.

The court of appeals has ignored this positive history and has further ignored the mandate of this Court to apply the standards of *Washington v. Davis* to this case. By so doing, it was able to justify the imposition of a systemwide remedy which negates much of the success of the Dayton Board. This systemwide remedy has also ignored the legitimate interests of the School Board and all of the parents and children of Dayton in order to achieve a goal of racial balance.

This Court's mandate in *Brown I* was not designed to lead to the unwarranted judicial interference evidenced in this case. Dayton's efforts in school desegregation should be recognized as an example of what local school boards are able to accomplish in a harmonious and friendly community atmosphere rather than attacked as a system which

continues to suppress minority citizens. For the reasons set forth herein, amicus curiae Pacific Legal Foundation urges this Court to find that the actions of the court of appeals were unwarranted and that the dismissal granted by the district court was the proper remedy in this case.

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Attorneys for Amicus Curiae
Pacific Legal Foundation

February 20, 1979.

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MAP: DAYTON ELEMENTARY SCHOOLS

1 - Shiloh Elementary
5670 Philadelphia Drive

2 - Meadowdale Elementary
4448 Thompson Drive

3 - Valerie Elementary
4020 Bradwood Drive

4 - Shoup Mill Elementary
450 Shoup Mill Road

5 - Belle Haven Elementary
4401 Free Pike

6 - Ft. McKinley Elementary
3725 Evansville Avenue

7 - Fairview Elementary
1305 W. Fairview Avenue

8 - Charles Loos Elementary
45 Wampler Avenue

9 - Brown Elementary
48 W.Parkwood Drive

10 - Hickorydale Elementary
2101 Hickorydale

11 - Gettysburg Elementary
2201 N. Gettysburg Avenue

12 - Fairport Elementary
1952 Fairport Avenue

13 - Cornell Heights Elementary
2826 Campus Drive

14 - Jefferson Elementary
1231 N. Euclid Avenue
Jefferson Primary
1223 N. Euclid Avenue

15 - Longfellow Elementary
245 Salem Avenue

16 - Van Cleve Elementary
45 W. Helena Street

17 - Hawthorne Elementary
226 McDaniel Street

18 - McGuffey Elementary
1032 Webster Street

19 - Webster Elementary
1115 Kiefer Street

20 - Allen Elementary
132 Alaska Street

21 - Gardendale Elementary
1733 N. Gettysburg Avenue

22 - Westwood Elementary
3410 Hoover Avenue

23 - McNary Elementary
2400 Hoover Avenue

24 - Grace A. Green Elementary
503 Edison Street

25 - Edison Elementary
228 N. Broadway

26 - F. C. MacFarlane Elementary
215 S. Summit Street

27 - Weaver Elementary
2000 Howell Avenue

28 - Jackson Elementary
317 Abbey Avenue
Jackson Primary
3201 McCall Street

29 - Residence Park Elementary
833 Elmhurst Road
Residence Park Primary
4411 Oakridge Drive

30 - Drexel Elementary
143 Miller Avenue

31 - Jane Addams Elementary
35 Victory Drive

32 - F. G. Carlson Elementary
807 S. Gettysburg Avenue

33 - Wogaman Elementary
2716 Germantown Street

34 - Highview Elementary
2101 McArthur Avenue

35 - Miami Chapel Elementary
1630 Miami Chapel Road
Louise Troy Primary
1665 Richley Avenue

36 - Whittier Elementary
721 Miami Chapel Road

37 - Irving Elcmentary
355 Cincinnati Street

38 - Emerson Elementary
501 Hickory Street

39 - Huffman Elementary
100 Huffman Avenue

40 - Washington Elementary
2900 E. First Street

41 - Orville Wright Elementary
200 S. Wright Avenue

42 - Franklin Elementary
2617 E. Fifth Street

43 - Ruskin Elementary
275 McClure Street

44 - Patterson Elementary
258 Wyoming Street

45 - Lincoln Elementary
401 Nassau Street

46 - Cleveland Elementary
1102 Pursell Avenue

47 - Kemp Elementary
816 Shedbourne Avenue

48 - U. S. Grant Elementary
4309 Arcadia Boulevard

49 - Lewton Elementary
4032 Linden Avenue

50 - Eastmont Elementary
1480 Edendale Road

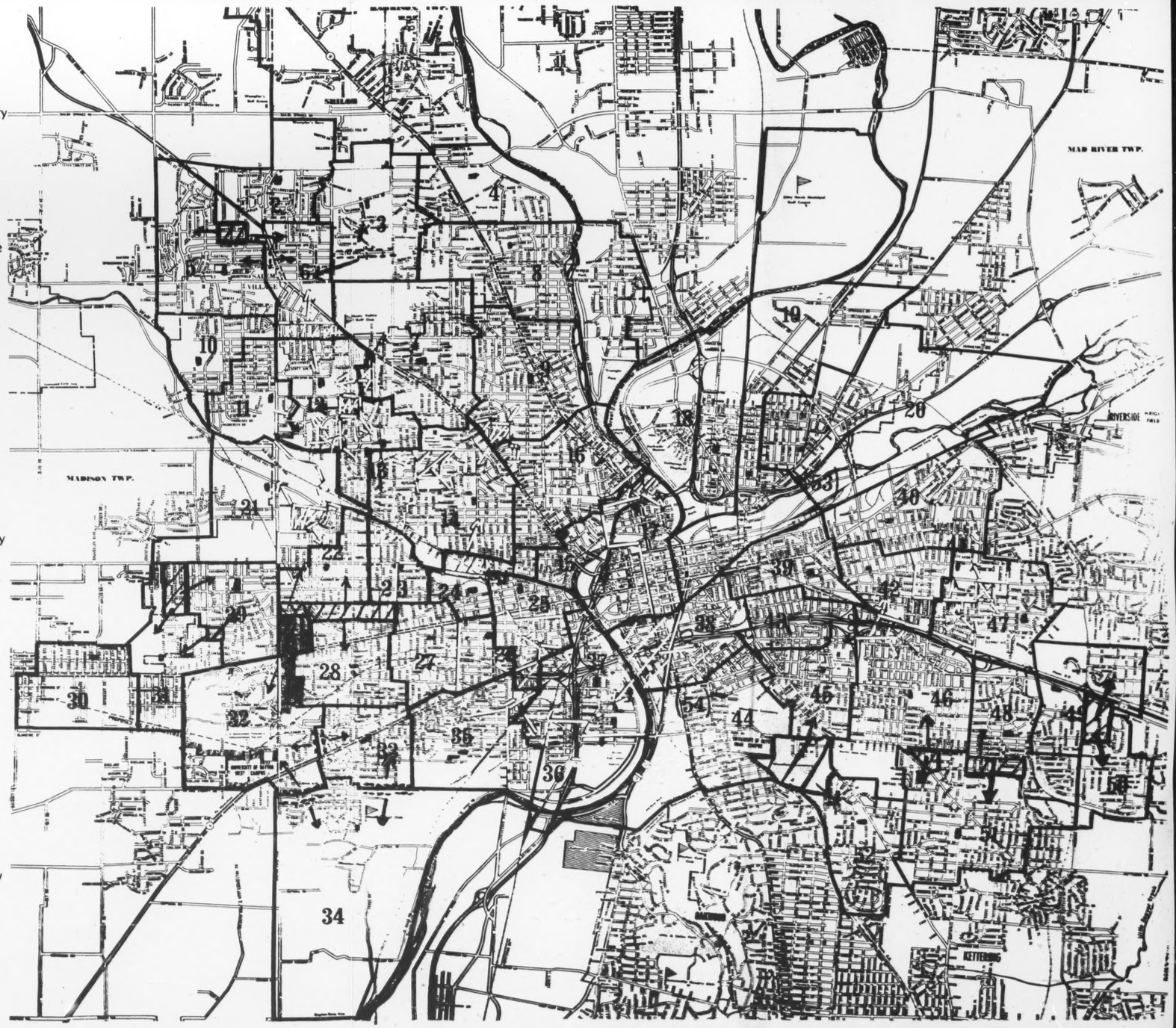
51 - Belmont Elementary
2745 S. Smithille Road

52 - Horace Mann Elementary
715 Krebs Avenue

53 - Gorman (Crippled)
156 Grant Street

54 - Kennedy (Deaf)
240 Wyoming Street

CAUTION: SCHOOL DISTRICTS FOR SPECIFIC ADDRESSES SHOULD BE VERIFIED THROUGH THE PUPIL PERSONNEL DEPARTMENT



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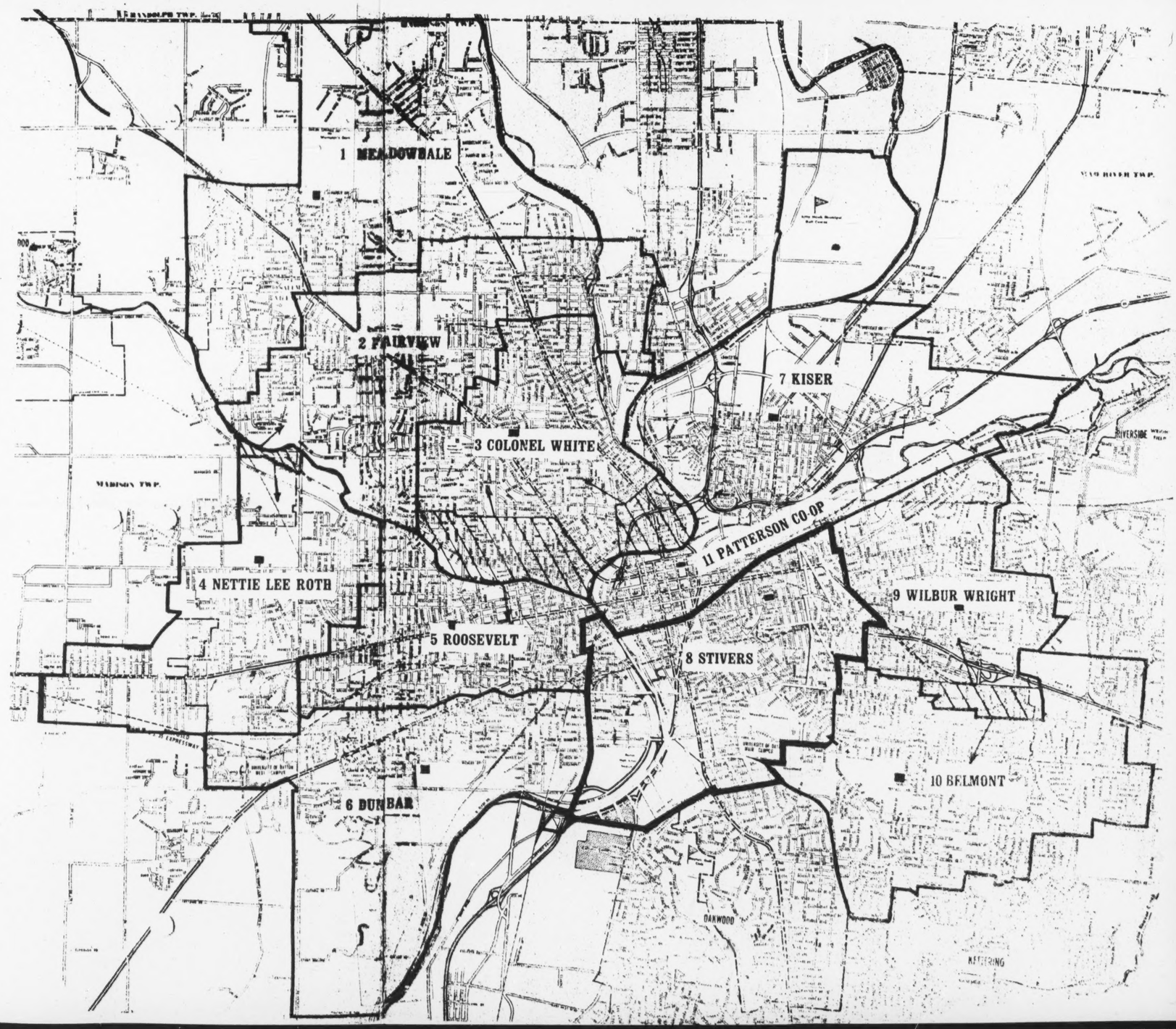
MAP: DAYTON HIGH SCHOOLS

DAYTON PUBLIC HIGH SCHOOLS KEY

1. MEADOWDALE HIGH SCHOOL
   4417 Williamson Drive
2. FAIRVIEW HIGH SCHOOL
   2408 Philadelphia Drive
3. COLONEL WHITE HIGH SCHOOL
   501 Niagara Avenue
4. NETTIE LEE ROTH HIGH SCHOOL
   4535 Hoover Avenue
5. ROOSEVELT HIGH SCHOOL
   2013 W. Third Street
6. DUNBAR HIGH SCHOOL
   2222 Richley Avenue
7. KISER HIGH SCHOOL
   1401 Leo Street
8. STIVERS HIGH SCHOOL
   1313 E. Fifth Street
9. WILBUR WRIGHT HIGH SCHOOL
   1361 Huffman Avenue
10. BELMONT HIGH SCHOOL
    2323 Mapleview Avenue
11. PATTERSON COOPERATIVE
    118 E. First Street
    (Serves All Dayton)

Indicates Optional Area
(Arrows Indicate Option)